Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM—1972

No. 72-644

D. C. TRANSIT SYSTEM, INC.,
Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
Respondent,

and

DISTRICT OF COLUMBIA CITY COUNCIL, BLACK UNITED FRONT and DIANA K. POWELL,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 6

Reasons for Granting the Writ 11

Conclusion 29

TABLE OF AUTHORITIES

CASES:

Blanton v. *Belt Line Ry.*, 268 U. S. 413 (1925) ...12, 27

Bluefield Water Works & Improvement Co. v. *West Virginia Pub. Serv. Comm'n*, 262 U. S. 679 (1923) 12, 27

City of Bangor v. *Public Util. Comm'n*, 156 Me. 455, 167 A. 2d 6 (1960) 20

D. C. Transit System, Inc. v. *Washington Metropolitan Area Transit Comm'n*, 350 F. 2d 753 (D. C. Cir. 1965) 11

D. C. Transit System, Inc., Re, 85 P. U. R. 3d 1 (Washington Metropolitan Area Transit Comm'n 1970) 13, 23

D. C. Transit System, Inc., Re, 85 P. U. R. 3d 33 (Washington Metropolitan Area Transit Comm'n 1970) 16

Denver Union Stock Yard Co. v. *United States*, 304 U. S. 470 (1938) 12, 27

District of Columbia v. *Washington Metropolitan Area Transit Comm'n*, Appeal No. 24,415 (D. C. Cir. July 10, 1970) 13

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Petitioner, D. C. Transit System, Inc. ("Transit") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") entered in the above matter of July 28, 1972.

CITATIONS TO OPINIONS BELOW

The orders of the Washington Metropolitan Area Transit Commission ("Commission"), Order No. 1216 (served May 19, 1972), Order No. 1216-A (served May

25, 1972), Order No. 1216-B (served May 25, 1972), and Order No. 1219 (served June 16, 1972), are printed at pages A-57 to A-77, A-78 to A-82, A-83 to A-84 and A-85 to A-104 of the Appendix, respectively. The decision of the Court of Appeals (per Circuit Judge Robinson) and the special concurrence of Circuit Judge MacKinnon, dated July 28, 1972, are printed at pages A-1 to A-56 of the Appendix. None of the foregoing have been reported as of the date of this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1972. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals violated fundamental principles of due process in holding that a regulated public utility, which concededly was entitled to "additional revenue" without which it would be required to operate at a loss, was not entitled to receive such additional revenue unless it acquired an additional $6.4 million of equity capital within 90 days?

2. Whether this Court should exercise its discretion in granting certiorari where the Court of Appeals, contrary to orderly judicial administration, has sanctioned the action of an administrative agency in attempting to effect a public takeover of a public utility under circumstances where Congress had expressly prohibited the public takeover of such public utility?

3. Whether this Court should exercise its discretion in granting certiorari where the Court of Appeals has erroneously found that Transit did not properly raise the issue of whether the record supported the Commission's finding

that Transit's management was inefficient and uneconomical, when in fact Transit did expressly raise such issue in the prescribed statutory manner?

STATUTES INVOLVED

The constitutional provisions involved are Amendment V of the Constitution of the United States which provides:

> "No person shall . . . be deprived of . . . property, without due process of law. . . ." U.S.C.A. Const. Amend. 5.

and Amendment XIV which provides:

> ". . . [N]or shall any State deprive any person of . . . property, without due process of law. . . ." U.S.C.A. Const. Amend. 14 § 1.

The statutory provisions involved are Sections 6(a)(4) and 16 of Title II, Article XII of the Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960), 1 D. C. Code § 1410 (1967 ed.) ("Compact"), Section 4 of Transit's Congressional Franchise, Public Law 84-757, 70 Stat. 598 (1956) ("Franchise"), and Section 82(a) of the Washington Metropolitan Area Transit Authority Compact, Public Law 89-774, 80 Stat. 1352, 1 D. C. Code § 1-1431 (1967 ed.).

Section 6(a)(4) of the Compact provides:

> "(4) It is hereby declared as a matter of legislative policy that in order to assure the Washington Metropolitan District of an adequate transportation system operating as private enterprises the carriers therein, in accordance with standards and rules prescribed by the Commission, should be afforded the

opportunity of earning such return as to make the carriers attractive investments to private investors. As an incident thereto, the opportunity to earn a return of at least 6½ per centum net after all taxes properly chargeable to transportation operations, including but not limited to income taxes, on gross operating revenues, shall not be considered unreasonable."

Section 4 of the Franchise provides:

"Sec. 4. It is hereby declared as a matter of legislative policy that in order to assure the Washington Metropolitan Area of an adequate transportation system operating as a private enterprise, the Corporation, in accordance with standards and rules prescribed by the Commission, should be afforded the opportunity of earning such return as to make the Corporation an attractive investment to private investors. As an incident thereto the Congress finds that the opportunity to earn a return of at least 6½ per centum net after all taxes properly chargeable to transportation operations, including but not limited to income taxes, on either the system rate base or on gross operating revenues would not be unreasonable, and that the Commission should encourage and facilitate the shifting to such gross operating revenue base as promptly as possible and as conditions warrant; and if conditions warrant not later than August 15, 1958. It is further declared as a matter of legislative policy that if the Corporation does provide the Washington Metropolitan Area with a good public transportation system, with reasonable rates, the Congress will maintain a continuing interest in the welfare of the Corporation and its investors."

Section 16 of the Compact provides:

"Reconsideration of Orders

16. Any person affected by any final order or decision of the Commission may, within thirty days after the publication thereof, file with the Commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No person shall in any court urge or rely on any ground not so set forth in such application. The Commission, within thirty (30) days after the filing of such application, shall either grant or deny it. If such application is granted, the Commission, after giving notice thereof to all interested persons, shall, either with or without hearing, rescind, modify or affirm its order or decision. The filing of such an application shall act as a stay upon the execution of the order or decision of the Commission until the final action of the Commission upon the application, except that upon written consent of the applicant such order or decision shall not be stayed unless otherwise ordered by the Commission. No appeal shall lie from any order of the Commission until an application for reconsideration has been made and determined."

Section 82(a) of the Washington Metropolitan Area Transit Authority Compact provides:

"Condemnation

82. (a) The Authority shall have the power to acquire by condemnation, whenever in its opinion it is necessary or advantageous to the Authority to do so, any real or personal property, or any interest therein, necessary or useful for the transit system

authorized herein, except property owned by the United States, by a signatory, or any political subdivision thereof, or by a private transit company."

STATEMENT OF THE CASE

Transit is a corporation established under the laws of the District of Columbia on July 9, 1956 and is engaged in the mass transportation of passengers for hire within the District of Columbia and between certain points within the District of Columbia and the States of Maryland and Virginia pursuant to its Franchise.

The Proceeding Before the Commission

On December 28, 1971, largely as a consequence of its increased labor costs, Transit filed an application for new fares ("Application") with the Commission. The Application showed that, under existing fares, Transit would have a net loss of approximately $3.5 million after interest expenses from its operation for the future annual period. The Application requested a schedule of new fares that would enable Transit to earn a fair and reasonable rate of return in the future annual period.

On May 19, 1972, after 24 days of formal hearings during which ten protestors and intervenors were admitted and a record of 4,483 transcript pages was compiled, the Commission served Order No. 1216 wherein it denied Transit's Application for an increase in its fares. The Commission conceded that Transit was entitled to "additional revenue" (Order No. 1216, p. A-64) without which it would be required to operate at a loss. Nevertheless, the Commission refused to provide Transit with a new schedule of fares. Instead the Commission preconditioned any future increase in Transit's fares on Transit's willingness to make certain changes in its debt-equity ratio within 90 days

by increasing equity capital by $6.4 million in cash and using it (a) to retire a portion of its outstandng debt, (b) to purchase new buses solely for cash, and (c) to improve certain aspects of its service.

During the hearings, no consideration was given, nor was any evidence introduced by anyone, nor was any suggestion made by anyone as to the imposition of preconditions to a fare increase, nor as to any time deadline (90 days or otherwise), nor as to whether such a period was reasonable, nor as to whether the action required by the Commission could in fact be accomplished during such period.* In his concurring opinion, Judge MacKinnon said that he joined in the majority opinion of the Court of Appeals only because "there is no basis *on this record* for concluding that it would be impossible for Transit to comply with the conditions imposed by the Commission."(Court of Appeals decision, p. A-55). However, since no evidence was introduced at the hearings concerning the necessity of completing the debt-equity ratio changes either prior to any stated deadline or as a pre-condition to a fare increase, it was impossible for there to be anything "in the record" showing that Transit could *not* comply with such conditions.**

The Commission found that Transit's failure to secure more equity capital and the resulting failure to retire debt, purchase new buses,*** and make certain improvements in

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*Subsequent events have shown that the Commission's orders could not be complied with within such time period and, consequently, a fare increase was precluded by Order No. 1216.

**To the extent the "record" can be said to include Transit's Application for Reconsideration, at the date that document was filed (June 1, 1972), there was no way of Transit's knowing whether, with due diligence, compliance with the preconditions would be possible.

***Transit's failure to purchase new buses has been occasioned by the failures of the Commission's projections of revenues and expenses in prior rate proceedings to meet expectations (Transit's Exhibit No. 29).

its service* indicated that its management was "not efficient and economic". (Order No. 1216, p. A-74). Finally, the Commission expressed its displeasure with the Congress' failure to forestall recent increases in Transit's fares by failing to enact subsidy legislation.**

On May 25, 1972, Vice-Chairman Sullivan served a dissenting opinion, Order No. 1216-A, in which he explained why he believed Order No. 1216 was "violative of the Constitution" and "an encroachment on the prerogative of [Transit's] Management." Vice-Chairman Sullivan stated:

> "Transit has proven beyond any doubt, in this proceeding at least, that its *expenses exceed revenues.* In my view the action of the majority to delay or

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*The Commission found that Transit's service was inadequate based on an increase in the number of missed trips by Transit buses in 1972 over 1971 (Order No. 1219, pp. A-95 to A-96, n. 10), although the staff's own witness, Charles W. Overhouse, stated that the number of missed trips was "insignificant" (Tr. 2267, 3116-17). The percentage of missed trips was less than one-tenth of one percent of all trips operated (Tr. 2267-2268).

**Order No. 1216, pp. A-76 to A-77 states:

> "We have tried very hard to avoid that result [any increase in Transit's fares] through legislative channels. Three years ago we proposed to the Congress a subsidy for D. C. Transit riders so that the fare could remain at the then-existing level of 30 cents. We even suggested that the fare should be lowered to 25 cents and kept at that level through public subsidy. Our plea at that time was given little attention. We warned then that the failure to provide a subsidy would inevitably result in higher and higher fares. Again, in this session of the Congress, during the pendency of this very rate case, we appealed to the Congress for a subsidy in order to maintain the bus fare at the 40-cent level. We pointed out the very destructive impact of increasing fares. But the House of Representatives overwhelmingly rejected the provision of a subsidy. Whatever caused that result, it is a failure of government to respond to the needs of the community. Until that failure is remedied, the spectre of higher bus fares and their destructive impact, will be with us."

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reject consideration of the need for a fare increase in order to effect changes in capital structure and financing amounts to nothing more than an attempt to 'blackjack' Transit, by subjecting a portion of the property of the Company to 'confiscation,' which in itself is violative of the Constitution.

"As a reasonable alternative, the Commission can assume, for rate-making purposes, what it deems to be an appropriate equity-debt ratio and project revenue requirements on this assumed capital structure and set rates accordingly. The approach taken by the majority has left Transit literally 'dangling', by simply stating 'Put in more capital—irrespective of its source and moreover, irrespective of the very probable lack of potentiality of any such source.'

"This attitude, in my judgment, amounts to an encrouchment [sic] on the prerogative of Management and thereby preempts the inviolate rights of the Company to manage its own affairs." Order No. 1216-A at A-79.

On June 1, 1972, Transit filed with the Commission, pursuant to Section 16 of the Compact, an application for reconsideration* of Order No. 1216. In its Application for Reconsideration, Transit specifically stated the errors of the Commission. Transit stated that the Order No. 1216 was invalid because, among other reasons, (a) it compelled Transit to operate at a loss in violation of the due process clauses of the Constitution,** (b) it represented an attempt by the Commission to force a public takeover of

*Transit's "Notice of Invalidity of Order No. 1216 And, In The Alternative, Application For Reconsideration of Order No. 1216," item number 60 on the "Index of Record" filed by the Commission with the Court of Appeals.

**See Transit's Application for Reconsideration, Paragraphs 8 and 9.

Transit without due process,* and (c) the Commission's finding that Transit's management was inefficient and uneconomical was not supported by the record.**

On June 16, 1972 the Commission served Order No. 1219 in which it denied Transit's Application for Reconsideration. Vice-Chairman Sullivan again dissented. On that same date, Transit filed a petition with the Court of Appeals for the review of Commission Orders Nos. 1216 and 1219, pursuant to Section 17(a) of the Compact.

The Court of Appeals Decision

In its July 28, 1972 decision, the Court of Appeals affirmed the orders of the Commission. In so doing, the Court of Appeals held (a) that Transit could be compelled to operate at a loss since its management was found by the Commission to be inefficient and uneconomical (Court of Appeals decision pp. A-52 to A-54) and (b) that Transit had failed to properly raise the issue of whether the record supported the Commission's findings that Transit's management was inefficient and uneconomical (Court of Appeals decision, pp. A-33 to A-36).

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*See Transit's Application for Reconsideration, Paragraph 42.

**See Transit's Application for Reconsideration, Paragraphs 17 and 31.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS VIOLATED THE FUNDAMENTAL PRINCIPLES OF DUE PROCESS IN HOLDING THAT A REGULATED PUBLIC UTILITY, WHICH CONCEDEDLY WAS ENTITLED TO "ADDITIONAL REVENUES" WITHOUT WHICH IT WOULD BE REQUIRED TO OPERATE AT A LOSS, WAS NEVERTHELESS NOT ENTITLED TO RECEIVE SUCH ADDITIONAL REVENUES UNTIL IT HAD ACQUIRED AN ADDITIONAL $6.4 MILLION OF EQUITY CAPITAL WITHIN 90 DAYS

A. Fundamental Principles of Due Process Require That The Return From Operations Allowed to a Regulated Public Utility Cannot be Set at an Amount Below the Point of Confiscation

It is not seriously questioned that Transit will be forced to operate at a substantial loss in the future annual period at present fares.* Hence, under present fares, Transit *cannot* cover the interest on its debt; it *cannot* pay dividends; it *cannot* retain a sufficient surplus to finance down payments on equipment; it *cannot* ensure continued adequate service; and it *cannot* achieve financial strength and stability—all of which the Court of Appeals had previously stated were items which were to be covered by operating revenues in order for a rate structure to be fair and reasonable. *D. C. Transit System, Inc.* v. *Washington Metropolitan Transit Comm'n*, 350 F. 2d 753, 778 (D. C. Cir. 1965).

By forcing Transit to operate at a loss, the Court has virtually foreclosed the possibility of attracting new equity

*The Court of Appeals decision, p. A-45, n. 183.

capital to Transit while demanding that Transit attract such additional capital as a precondition to a rate increase.* It is indeed clear, that, under the circumstances, Transit could not attract debt capital either. As Judge MacKinnon noted in his concurring opinion, the Commission's action in "*ordering* Transit, in its ailing condition, to attract such large sums of new money may be analogous to a doctor ordering a patient who had just suffered a severe heart attack to get up and run a marathon."

Fundamental principles of due process require that a governmentally-fixed rate cannot confine a public utility's return from operations to an amount below the point of confiscation. This basic proposition has been reiterated by this Court time and time again. *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 475 (1938); *United Rys. & Elec. Co.* v. *West*, 280 U. S. 234, 249 (1930); *Blanton* v. *Belt Line Ry.*, 268 U. S. 413, 416-17 (1925); *Bluefield Water Works & Improvement Co.* v. *West Virginia Pub. Serv. Comm'n* 262 U. S. 679, 690 (1923).

In *Bluefield Water Works & Improvement Co., supra,* this Court stated:

> "Rates which are not sufficient to yield a reasonable return on the value of the property used, at the time it is being used to render the service, are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the 14th Amendment." 262 U. S. at 690.

*It should be noted that Transit has paid no dividends since 1966 so it cannot be argued that Transit's financial plight is due to benefits derived by Transit's stockholders (Transit Exhibit No. 8).

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Until its recent decision in this case, the United States Court of Appeals for the District of Columbia had indicated its agreement with this basic principal. In denying a motion by the District of Columbia Government to stay the Commission's order in the last rate proceeding involving Transit,* the Court of Appeals as recently as July 10, 1970 stated:

> "Whatever the ultimate solution of the troubled transit problem, all the interested parties may as well start from the premise that if the company operates at all, *it cannot be compelled to operate at a loss.* For the interested parties here or the general public to proceed on any other premise is to engage in wishful thinking which can only lead to bitter frustration and disillusion." *District of Columbia* v. *Washington Metropolitan Area Transit Comm'n*, Appeal No. 24,415, (D. C. Cir. decision dated July 10, 1970) (Emphasis supplied).

B. Even Assuming That a Public Utility Could be Required to Operate at a Loss if Its Management Were Inefficient and Uneconomical, There is no Substantial Evidence to Support the Finding That Transit's Management is Uneconomical and Inefficient, and, Therefore, Transit should be Allowed a Return From Operations Above the Point of Confiscation.

In Order No. 1216, the Commission concludes that Transit's management is not economic or efficient because Transit has a high debt-equity ratio. As a result of Transit's

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Re D. C. Transit System, Inc., 85 P. U. R. 3d 1 (Washington Metropolitan Area Transit Comm'n 1970).

lack of capital, the Commission found that Transit has been unable to (a) reduce its outstanding debt, (b) purchase new buses, and (c) make certain improvements in its service. However, the record shows (1) that Transit's lack of capital was in no way related to the level of services offered nor to any improvements therein and (2) that Transit's failure to reduce its outstanding debt and its failure to purchase new buses has been occasioned by the repeated failure, in prior rate cases, of the Commission's projections of revenues and expenses to meet expectations.*

In addition, the Commission's finding that Transit's service was inadequate was based on an increase in the number of Transit's missed trips in 1972 over 1971 (Order No. 1219, pp. A-95 to A-96, n. 10). However, there is no substantial evidence in the record which would support the Commission's findings. In the hearings, Charles W. Overhouse, the chief engineer of the Commission staff and the person responsible for determining the adequacy of Transit's service, arbitrarily chose the weekday of April 10, 1972 to test the adequacy of such service. On that date Transit reported that it had missed 20 trips (Tr. 2267). In his testimony, Mr. Overhouse conceded that Transit operated approximately 12,000 trips on an average weekday, such as April 10, 1972 (Tr. 2268). Thus, *the trips missed (20) amounted to only one-tenth of one percent of the trips operated (12,000)* (Tr. 2267-2268). Mr. Overhouse conceded that the number of Transit's missed trips was "insignificant" (Tr. 2267, 3116-3117). This certainly does not constitute substantial evidence in the record in this case which would support the Commission's finding that

*The Commission concedes that part of Transit's financial problems are due to the fact that revenue forecast in the Commission's prior rate orders, never fully materialized (Order No. 1216, p. A-73). Indeed, such unreasonable regulatory practices on the part of the Commission have played a very important part in Transit's current financial problems.

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Transit's service was inadequate because of the number of its missed trips.*

The only evidence before the Commission clearly showed that Transit's operations have been efficient and that service has been adequate. No substantial evidence was adduced to rebut the extensive analysis of statistical data on the operations of Transit and other mass transportation systems made by Transit's expert witness, John F. Curtin (Tr. 1021-40) which led him to conclude that:

> "[Transit] is manifestly a well managed and efficient system with a potential for being possibly the best in the industry if it had adequate capital resources." Tr. 1032.

The expert witness of the Commission's staff, Pasquale A. Loconto, expressly disclaimed any attempt on his part to evaluate the efficiency of Transit's management for any purpose, testifying as follows:

> "I am in no way trying to measure the efficiency of management." Tr. 2069.

Finally, the Commission failed to explain the obvious conflict of its present findings and its findings at the conclusion of the last rate proceeding, in which the Commission found that no facts had been presented "indicating that Transit's basic problems lie in inadequate management" nor could it find any "basis in the record for saying that the

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*The record shows that Transit has repeatedly applied to the Commission for permission to reduce or eliminate unprofitable service so as to improve its efficiency. With reduced ridership it is essential for an efficiently run company to reduce operating expenses to meet the reduced demand. However, the Commission has invariably prevented Transit from putting such reductions into effect, thereby decreasing the efficiency of Transit's overall operations (Tr. 764, 777, 783-84, 933-38, 2818-28, 2854-62, 3052).

need for additional revenues could be taken care of by a more honest, economical and efficient management." *Re D. C. Transit System, Inc.* 85 P. U. R. 3d 33, 37 (Washington Metropolitan Area Transit Comm'n 1970).

It is clear from the foregoing that the Commission has sought to penalize Transit for one crime and one crime only—the fact that Transit has insufficient money. The real complaint of the Commission and the problems of Transit which the Commission tried to camouflage by its findings that Transit's management was inefficient and uneconomical was that Transit had insufficient money. The record is clear that Transit has not been allowed adequate rates of return in its prior rate proceedings before the Commission (Transit's Exhibit No. 29; Order No. 1216, p. A-73). Over the years, as a result of this, Transit has been unable to produce an earned surplus or attract additional equity to improve its debt-equity ratio and has been unable to conclude satisfactory financial arrangements to finance the purchase of new buses. The fact that the Commission had "ordered" Transit to improve its capital structure and buy new buses to improve its efficiency and economy is academic unless the Commission allows Transit to operate profitably. For the Commission to issue such "orders" without giving Transit the means to comply is as effective and productive as the legendary order of Xerxes that three hundred lashes be inflicted upon the rebellious sea.*

Thus, even if, *arguendo*, a utility could be compelled to operate at a loss if it were found to be uneconomical or inefficient, there is no substantial evidence in the record to

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*That punishment was inflicted upon the waters of the Hellespont as a reprisal for the storm and waves which destroyed Xerxes' newly constructed pontoon bridge across the Hellespont and with it his plans to attack Greece. *The History of Herodotus*, Vol. II, Book VII, ch. 33-36, pp. 134-135 (E. H. Blakeney ed.; London, Dent Publishing Co. 1964).

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support such a finding. Clearly, therefore, even under such a regulatory theory, fundamental principles of due process require that Transit be allowed a return from operations in an amount above the point of confiscation.

C. Even Assuming that Management of a Public Utility Were Inefficient and Uneconomical, Fundamental Principles of Due Process Require that a Return From Operations Be Allowed to Transit in an Amount Above The Point of Confiscation

Even assuming, *arguendo*, that lack of efficiency and economy could be attributed to Transit's management because of its failure to obtain new equity capital so that it could (a) reduce its outstanding debt, (b) purchase new buses, and (c) improve certain aspects of its service, that would not justify the action of the Court of Appeals and the Commission in requiring Transit to operate at a loss.

For many years, regulatory agencies have provided a greater rate of return for efficient management and a lesser return for inefficient management. As Justice Brandeis said, concurring in *Missouri ex. rel. Southwestern Bell Tel. Co.* v. *Missouri Pub. Serv. Comm'n*, 262 U. S. 276 (1923).

> "The reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more [than the cost of conducting the business]." 262 U. S. at 291.

Similarly, where less than adequate service and management has been provided, a company's rate of return has been confined to the lower level of reasonableness. See, *e.g. Re Norwalk Independent Tel. Co.*, 27 P. U. R. 3d 17 (Wis. Pub. Serv. Comm'n 1959); *Re General Tel. Co.*, 28 P. U. R. 3d 452 (Ga. Pub. Serv. Comm'n 1959). However, inefficient management is no basis for requiring a company to operate at a loss.

The efficiency of the management of a utility should not be solely determinative of its rate of return. In *Elyria Tel. Co. v. Public Util. Comm'n*, 158 Ohio St. 441, 110 N. E. 2d 59, 98 P. U. R. (N. S.) 246 (1959), the Supreme Court of Ohio held that the commission may require both adequate service and reasonable rates, but that although the two are related, they "are not wholly dependent on each other." 110 N. E. 2d at 62. In that case, the current rates were found to be inadequate in meeting the utility's needs, and the issue was whether an increase could be conditioned on improvements in service. The Ohio Supreme Court said that such a precondition could *not* be imposed upon the utility. As that Court stated:

> "A utility to survive must receive a fair return on its property. Otherwise capital will not be attracted to furnish the funds for the new equipment needed to meet the demands of increased population and the consequential necessity for increased service. The Commission's order as made has the effect of creating serious difficulties for the company. A situation is present where the company needs an increase in rates to attract capital to buy new equipment and to meet increased demands, and the Commission says, in effect, 'we will give you the new rates to attract the new capital to purchase new equipment when you show that you have installed the new equipment.' Adoption of such an attitude would hamstring the utility.
>
> "A Public Utility Commission may not so act as to confiscate the property of a utility, and where it is determined that adequate rates do not exist, an order granting an increase but suspending the same until such time as certain facilities and improvements are provided does have that effect." 158 Ohio

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St. at 447, 110 N. E. 2d at 62-63, 98 P. U. R. (N. S.) at 249-50.

The reasoning of the *Elyria* decision has been followed by the highest courts of several states. See, *Village of Apple River* v. *Illinois Commerce Comm'n*, 18 Ill. 2d 578, 165 N. E. 2d 329, 53 P. U. R. 3d 310 (1960); *Florida Tel. Corp.* v. *Carter*, 70 So. 2d 508, 3 P. U. R. 3d 145 (Fla. 1954); *General Tel. Co. of Mich.* v. *Public Serv. Comm'n*, 341 Mich. 620, 67 N. W. 2d 882, 8 P. U. R. 3d 97 (1954). As stated in an early New Jersey case, "A starved utility is in no better position to render proper service than a starved horse or a motor car without fuel." *Elizabeth* v. *Board of Pub. Util. Comm'rs*, 123 Atl. 358, 360 (Ct. Err. & App. 1924.

In support of the proposition that an inefficient and uneconomical public utility could be required to operate at rates which result in a loss, the Court of Appeals cites four cases.* Of the four cases, *In re Metropolitan Coach, supra,* is the only case cited in which a public utility was required to operate at a loss. In that case a rate increase was denied by the Public Utilities Commission of the District of Columbia in spite of an operating deficit on the part of the public utility. However, in that case, the commission found seriously inadequate service conditions which had "repeatedly" been brought to the attention of the company. 1915D P. U. R. at 741. It should be noted that the *Metropolitan Coach* decision by the District of Columbia Public Utilities Commission has not been followed, or even cited, since 1915; such a regulatory agency decision is a dubious precedent as the only authority supporting a decision by a United

**New Jersey Cent. Traction Co.* v. *Board of Public Util. Comm'n*, 96 N. J. L. 90, 113 A. 692, 696 (1921); *Rockville Water & Aqueduct Co.*, 78 P. U. R. 3d 45, 52 (Conn. Pub. Util. Comm'n 1968); *In re Metropolitan Coach*, 1915D P. U. R. 740, 741 (D. C. Pub. Serv. Comm'n 1915); Cf. *Hamilton* v. *Caribou Water, Light & Power Co.*, 121 Me. 422, 117 A. 582, 583-84 (1920).

States Court of Appeals that a public utility can be required to operate at rates which are confiscatory.

In *New Jersey Cent. Traction Co., supra*, the court held that when service was *unsafe and inadequate*, such service condition could be considered in denying an increase in rate. However, in that case, no claim was made that the utility would be compelled to operate at a loss if the rate increase were denied. Thus, that case is clearly distinguishable on its facts from the present case.

In *Rockville Water and Aqueduct Co., supra*, the utility was making a small *profit* but lacked the funds for necessary improvements. It was denied a rate increase because the water it supplied was substandard. Again, from the fact that the utility in that case was not compelled to operate without *some* measure of return distinguishes it from the present case.

In *Hamilton* v. *Caribou Water, Light & Power Co., supra*, the Supreme Judicial Court of Maine declined to review a commission's decision as to the adequacy of service and the confiscatory nature of the rates, stating:

> "In case the rates established by the Commission prove in practice to be confiscatory, they may be corrected upon a new petition. . . ." 117 A. at 584.

Thereafter, the *Hamilton* case was effectively overruled by *City of Bangor* v. *Public Util. Comm'n*, 156 Me. 455, 167 A. 2d 6 (1960). It should be noted that in Transit's case, the rates are conceded by both the Commission and the Court of Appeals to require Transit to operate at a loss—there is no need to await proof that they are confiscatory.

The obvious differences between these four cases and Transit's situation clearly indicate that they are not support for the proposition that Transit may be compelled to operate at a loss. Transit submits that the present day rule of law in the utility field on the relationship between adequacy

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of service and entitlement of a fare increase is set forth in *Re New York Telephone Co.*, 84 P. U. R. 3d 321, 358 (N. Y. 1970). In that case the New York Public Service Commission recognized that additional funds were required to improve service which was less than adequate and *granted* the rate increase in order that more adequate service could be provided.

Clearly, fundamental principles of due process require that a return from operations be allowed to Transit in an amount above the point of confiscation even if, *arguendo*, its management were found to be uneconomical and inefficient.

II

THIS COURT SHOULD EXERCISE ITS DISCRETION IN GRANTING CERTIORARI WHERE THE COURT OF APPEALS, CONTRARY TO ORDERLY JUDICIAL ADMINISTRATION, HAS SANCTIONED THE ACTION OF AN ADMINISTRATIVE AGENCY IN ATTEMPTING TO EFFECT A PUBLIC TAKEOVER OF A PUBLIC UTILITY UNDER CIRCUMSTANCES WHERE CONGRESS HAD EXPRESSLY PROHIBITED THE PUBLIC TAKEOVER OF SUCH PUBLIC UTILITY BY CONDEMNATION

This Court should exercise its discretion in granting certiorari in the present case because of its importance to orderly judicial administration. By its action, the Court of Appeals has sanctioned an administrative agency's efforts to force a public takeover of a privately-owned public utility to circumvent the express statutory prohibition against such public takeover by condemnation. As such, the decision of the Court of Appeals is unprecedented and should be reviewed by this Court. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947); Stern and Gressman, *Supreme Court Practice* 177 (4th ed. 1969).

In setting the preconditions to any increase in Transit's fares, the Commission was making a conscious decision to require Transit to operate at a loss, thereby forcing Transit to lose so much money that it would be forced to suspend operations or go into receivership and thus effecting the public takeover of Transit. In its Order No. 1216, the Commission clearly states that Transit was entitled to "additional revenue". Nevertheless, the Commission stated that it was trying "very hard" to avoid *any* increase in Transit's fares and it critized Congress for its failure to take action to forestall an increase. More specifically, the Commission stated that the failure of Congress to provide a subsidy for Transit represented "a failure of government to respond to the needs of the community." (Order No. 1216, pp. A-76 to A-77).

Only weeks before the issuance of Order No. 1216, the Chairman of the Commission, Jeremiah C. Waterman, testified that Transit was entitled to additional revenues of approximately $3-4 million* (See House of Representatives, U. S., Report of Proceedings, Hearings held before Subcommittee on Business, Commerce and Fiscal Affairs of the Committee on the District of Columbia re H. R. 2500 and H. R. 13019, Friday, April 28, 1972, Vol. 3, p. 166 (line 5), p. 167 (lines 5-6), and p. 200 (line 18). There is no reason given for the sudden change of position by the Commission but it is quite apparent that, having decided that a fare increase would not be a socially or politically

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*On April 14, 1972, Chairman Waterman stated:

"Only it has reached a very severe and critical point now. Unless some subsidy is provided or the fare is increased from 40 to 50 cents, the company will find it very difficult to continue in operation. In fact, they won't be able to." "District of Columbia Appropriations for 1973" Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, Ninety-Second Congress, Second Session, Part I, Page 675.

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acceptable result, the Commission decided to remedy the Congressional failure to forestall a fare increase by subsidies by forcing a public takeover via a receivership since Congress had expressly forbidden public takeover of Transit by condemnation.

The Commission's action is in accordance with that advocated by the District of Columbia Government in this and in prior cases in which it was a party or intervenor. See, e.g., Re D. C. Transit System, Inc., 85 P. U. R. 3d 1, 24-25 (Washington Meropolitan Area Transit Comm'n 1970). In these cases the District of Columbia Government has opposed all fare increases on the ground that public ownership of Transit was the only solution to Transit's need for increased revenues. This being the case, the District of Columbia took the position that such public ownership would be attained sooner if Transit were refused permission to charge fares which would provide a fair and reasonable rate of return, and, *moreover*, that the District of Columbia Government could acquire Transit's assets more cheaply if no fare increase were granted and Transit were compelled to operate at a loss.

The same social policy decision that fares charged by Transit should not be increased has been made by the federal courts in the District of Columbia. In an action* brought against Transit on May 26, 1972 to prevent Transit from increasing its fares, the United States District Court for the District of Columbia made the following social-political analysis of the problem instead of looking to Transit's rights under the Constitution, the Compact and the Franchise:

"Public transportation in this city and country is in a crisis. It has reached such proportions here that the whole problem requires careful attention in

*Civil Action No. 1060-72.

this city now from the Congress and all appropriate governmental agencies. If full public ownership or some form of subsidy is found to be the answer, we must accept this. . . ."

". . . [I]t is hoped that the Mayor and the parties will consider this crisis in our city as a matter of the highest priority which may deserve the immediate attention of the leadership of both Houses of Congress and their appropriate Committees, as well as the Federal Government, since this city and area and its public transportation system are so interdependent. There is no doubt that we cannot afford to be without a system which is sound, efficient, safe and provided at rates which all people regardless of economic status can enjoy."

The action of the Court of Appeals in sanctioning these attempts to force the public takeover of Transit by a regulatory agency which does not have jurisidiction to do so and in contravention of the specific Congressional action which provided that the assets of Transit could not then be taken over by condemnation proceedings (see Section 82(a) of the Washington Metropolitan Area Transit Authority Compact, *supra*) is unprecedented and contrary to orderly judicial administration. Clearly the action of the Commission exceeded its statutory authority. Similarly, the Court of Appeals exceeded its discretion in sanctioning the action of the Commission. Such an objective—the public takeover of a company—can only be accomplished with legislative authorization. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 103 F. Supp. 569, *aff'd*, 343 U. S. 579 (1952).

It is not the function of the Commission or the courts to consider the social or political desirability of a course of conduct in the regulation of the rates to be charged by a public

utility. It is for the legislature to make such decision, and any failure by the legislature to act may not be circumvented or remedied by the regulatory agency no matter how desirable such conduct. It is for the regulatory agency, in this case the Commission, to set the fares of Transit in accordance with the standards set by the Constitution, the Compact and the Franchise. It is for the Court of Appeals to insure that the Commission does not take onto itself the powers of the legislature to authorize condemnation or to assume the power of condemnation which was expressly withheld. And this the Court of Appeals must do in accordance with rules set forth in the Constitution, the Compact and the Franchise, not social or political consequences.

The result of the action of the Court of Appeals has been to set a precedent pursuant to which any regulatory agency in the nation could force a public takeover of a utility either in violation of the condemnation procedures provided by the legislature or in direct contravention of the intent of the legislature. The proper procedure and the one required for orderly judicial administration would have been for the Court of Appeals to have remanded the case to the Commission with directions to use only the statutory procedures set forth in the Compact and comply with the procedural principles of due process which require that governmentally-fixed rates cannot confine a public utility's return from operations to an amount below the point of confiscation.

III

THIS COURT SHOULD EXERCISE ITS DISCRETION IN GRANTING CERTIORARI WHERE THE COURT OF APPEALS HAS ERRONEOUSLY FOUND THAT TRANSIT DID NOT PROPERLY RAISE THE ISSUE OF WHETHER THE RECORD SUPPORTED THE COMMISSION'S FINDING THAT TRANSIT'S MANAGEMENT WAS INEFFICIENT AND UNECONOMICAL, WHEN IN FACT TRANSIT DID EXPRESSLY RAISE SUCH ISSUE IN THE PRESCRIBED STATUTORY MANNER

On June 1, 1972, Transit filed with the Commission its Application for Reconsideration of Order No. 1216. In this Application for Reconsideration, Transit specifically listed at least 52 errors of the Commission in Order No. 1216. One of many errors listed by Transit was that the Commission's findings that Transit's management is inefficient and uneconomical was not supported by the record. Such error was specifically included in paragraphs 17 and 31 of the Application for Reconsideration, where Transit alleged:

> "(17) In [Order No. 1216], the Commission has not 'respected procedural requirements, * * * made findings based on substantial evidence, and * * * applied the correct legal standards to its substantive deliberations' as required by *Williams* v. *WMATC, et al., supra,* 415 F. 2d at 942."

> "(31) [Order No. 1216] states that 'this record shows the present capital structure and debt structure of Transit do not reflect economic and efficient management' whereas the maintaining of a particular debt-equity ratio is not by itself a sufficient basis for a finding that Transit management is not 'economic and efficient'."

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Clearly, the foregoing paragraphs of Transit's Application for Reconsideration constitute a specific allegation by Transit that the Commission's findings on Transit's management are not supported by the evidence in the record. Nevertheless, the Court of Appeals refused to even consider Transit's arguments on this point, finding that Transit had failed to "state specifically" any "insufficiency of the supporting evidence as a ground for disturbing the Commission's findings on the caliber of Transit's management and service." Court of Appeals decision, p. A-35.

A. The Court of Appeals Violated Fundamental Principles of Due Process in Refusing to Consider Transit's Argument That the Record Does not Support the Commission's Finding that Transit's Management Was Inefficient and Uneconomical

The record is clear that Transit in fact did raise the issue of the insufficiency of the evidence upon which the Commission based its finding that Transit's management was "not efficient and economical." By refusing to consider such argument, the Court of Appeals has effectively deprived Transit of due process of the law. *Denver Union Stock Yard Co.* v. *United States, supra; United Rys. & Elec. Co.* v. *West, supra; Blanton* v. *Belt Line Ry., supra; Bluefield Water Works & Improvement Co.* v. *West Virginia Pub. Serv. Comm'n, supra.*

The effect of the Court of Appeals action has been to affirm the finding of the Commission regarding the caliber of Transit's management without reviewing the basis upon which the crucial finding was made and without giving Transit an opportunity to be heard on a point which it had properly raised below. As such the Court of Appeals' refusal to consider Transit's argument represents a violation of fundamental principles of due process. *Ibidem.*

B. Orderly Judicial Administration Requires This Court to Exercise Its Discretion in Granting Certiorari and Remanding the Proceeding to the Court of Appeals With Direction that the Court of Appeals Consider Transit's Argument that the Record Does Not Support the Commission's Finding that Transit's Management Was Inefficient and Uneconomical

By its action, the Court of Appeals has also effectively frustrated orderly judicial administration. *Gulf Oil Corp.* v. *Gilbert, supra;* Stern and Gressman, *Supreme Court Practice* 177 (4th ed. 1969).

Proper judicial procedure and orderly judicial administration require that the Court of Appeals consider arguments properly raised on appeal. In the present case Transit has been denied review of its argument that a crucial finding of the Commission, namely that Transit's management is inefficient and uneconomical, is not supported by the record.

The effect of this action of the Court of Appeals is to frustrate appellate review of administrative decisions and avoid a decision on the merits of the argument presented. However, Transit properly raised the issue below and is clearly entitled to a decision on the merits of its argument that there is no support in the record for such findings of the Commission.

Transit submits that orderly judicial administration requires that this Court remand the decision to the Court of Appeals with directions to consider Transit's argument on the merits. In his concurring opinion, Judge MacKinnon recognized that a remand of this case would be appropriate. As Judge MacKinnon stated:

> ". . . I believe that the Commission's disposition of this matter is only temporarily valid because of the

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uncertainties left open by the present inadequate record. I do not consider that the Commission has fully faced the entire problem." The Court of Appeals decision, pp. A-55 to A-56.

Accordingly, this Court should remand the decision of of the Court of Appeals with directions to the Court to consider Transit's argument on the merits.

CONCLUSION

For all of the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1972

No. 72-644

D. C. TRANSIT SYSTEM, INC.,
Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
Respondent,

and

DISTRICT OF COLUMBIA CITY COUNCIL, BLACK UNITED FRONT and DIANA K. POWELL,
Intervenors.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

PAGE

Opinion of the United States Court of Appeals for the District of Columbia Circuit A-1

Order No. 1216 of the Washington Metropolitan Area Transit Commission A-57

Order No. 1216-A of the Washington Metropolitan Area Transit Commission A-78

Order No. 1216-B of the Washington Metropolitan Area Transit Commission A-83

Order No. 1219 of the Washington Metropolitan Area Transit Commission A-85

INDEX

PAGE

..... A-1

..... A-37

..... A-79

..... A-83

..... A-85

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1555

D. C. TRANSIT SYSTEM, INC.,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,

Respondent,

and

DISTRICT OF COLUMBIA COUNCIL, BLACK UNITED FRONT and DIANA K. POWELL,

Intervenors.

ON PETITION TO REVIEW ORDERS OF THE WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

Decided July 28, 1972

Mr. Harvey M. Spear for petitioner.

Mr. Frank F. Flegal, Special Counsel, Washington Metropolitan Area Transit Commission, with whom *Messrs. Bernard Dobranski*, General Counsel, and *Stephen L. Sharfman*, Counsel, Washington Metropolitan Area Transit Commission, were on the brief, for respondent.

Mr. Edward B. Webb, Jr., Special Counsel, District of Columbia Council, for intervenor District of Columbia Council.

Opinion of the United States Court of Appeals

Mr. Michael J. Valder, with whom *Mrs. Elizabeth B. Kleeman* was on the brief, for intervenor Black United Front.

Miss Diana K. Powell, pro se, intervenor.

Before Fahy, *Senior Circuit Judge*, and Robinson and MacKinnon, *Circuit Judges*.

Opinion filed by Robinson, *Circuit Judge*.

Concurring opinion filed by MacKinnon, *Circuit Judge*, p. 59.

ROBINSON, *Circuit Judge*: The question for decision is whether the Washington Metropolitan Area Transit Commission erred in conditioning further consideration of a fare increase for a financially ailing carrier upon satisfaction of requirements designed to improve its service. We hold that, in the circumstances presented, the Commission's action is legally unobjectionable. We accordingly affirm the orders under review.

I. BACKGROUND OF THE LITIGATION

The Administrative Proceeding

On December 28, 1971, D. C. Transit System, Inc. (Transit), filed two tariffs[1] with the Commission which alternatively designated changes in its fares for regular-route transportation of passengers in the District of

[1]See Franchise Act § 7, 70 Stat. 598 (1956) (Franchise); Washington Metropolitan Area Transit Regulation Compact, tit. II, art. XII, §§ 5(a), 6(a) (Compact). The Compact is incorporated into Pub. L. 86-794, 74 Stat. 1031 (1960), and is set forth in full following D. C. Code § 1-1410 (1967 ed.). Amendments to the Compact appear as a part of Pub. L. 87-767, 74 Stat. 765 (1962), and are set forth following D. C. Code § 1-1410a (1967 ed.).

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Columbia and its Maryland and Virginia suburbs. The filings were accompanied by data indicating a net operating loss during an historical twelve-month period ending September 30, 1971, and forecasting another loss during a corresponding period ending April 30, 1973. To enable a suitable return in the future annual period, Transit proposed a variety of fare increases, notably for its intra-District cash and token patrons.[2] Transit designated January 27, 1972, as the date on which the new fares would take effect.

Transit submitted with the tariffs a motion for fare raise pending determination by the Commission of the general increment it sought. The Commission denied the motion, holding that an interim advance would not serve the public interest, and set hearings to begin at an early date. On January 26, 1972, the Commission suspended Transit's newly-filed tariffs through April 26, and on April 25 further suspended them until May 26. The hearings commenced in mid-February and, with numerous parties participating, extended well into May.[3] On May 19, the Commission, with one member dissenting,[4] promulgated its

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[2]Transit's first alternate tariff would increase the cash fare from 40 cents to 50 cents, and the token fare from 5 for $2.00 to 5 for $2.25 in the token fare, for regular service within the District of Columbia. Transfers would remain free, as they presently are. The second alternate tariff would increase the cash fare to 45 cents, the token fare to $2.25, and levy a 5-cent charge for transfers except on school tickets. Each tariff specifies increases for other intra-District services, for intra-Maryland services, and for Maryland and Virginia interstate services.

[3]Ten protestants and intervenors were admitted to the proceedings. Formal hearings consumed 24 days. Hearings on two additional days, in which 29 persons participated, afforded interested nonparty citizens an opportunity to express their views. The transcript of testimony and argument aggregates 4,483 pages.

[4]See note 7, *infra*.

primary order, No. 1216,[5] denying a fare increase, and by Order No. 1219,[6] issued on June 16, denied reconsideration of that ruling. These are the principal orders now under review.[7]

Since we later examine the Commission's orders closely, we confine our recitation at this stage to their highlights. The Commission, on preliminary examination of the financial data submitted by Transit, discerned a probable need for additional revenues.[8] The Commission found, however, that management decisions over the years had left Transit with an unstable financial structure which in turn had contributed substantially to an operation presently uneconomical and inefficient and a service seriously deteriorated.[9] In the Commission's view, the Washington Metropolitan Area Transit Regulation Compact [10] required it to insure not only the reasonableness of rates permitted regulated carriers but also the economy, efficiency and adequacy of their service to the public.[11] The Commission concluded that it could not discharge its responsibilities by granting Transit a fare raise without prior demonstration of Transit's willingness to ameliorate its financial

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[5] *D. C. Transit Sys., Inc.* (Order No. 1216) (WMATC May 19, 1972) (not yet reported).

[6] *D. C. Transit Sys., Inc.* (Order No. 1219) (WMATC June 16, 1972) (not yet reported).

[7] The additional orders are No. 1216-A, issued May 25, 1972, which is the dissenting opinion of the Commission's vice chairman, and No. 1216-B, issued the same day, which is the majority's supplemental order in response to the dissent.

[8] *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 7, 16. See also *D.C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 2.

[9] *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 8-14; *D.C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 1.

[10] See note 1, *supra*.

[11] *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 14-15; *D.C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 1, 4-8, 15.

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situation by capital funding from sources other than its fareboxes.[13] Attributing Transit's financial plight more largely to management than to insufficient revenues,[18] and recounting a nine-year history of recalcitrance despite exhortation to remedy its ills,[14] the Commission found a lack of assurance that corrective measures would be adopted even if it established funding requirements concurrently with an award of higher fares.[15] The sole alternative, the Commission decided, was the company's acquisition of new capital as a precondition to any such addition.[16]

On these grounds, the Commission, in Order No. 1216, found that the fare increases set forth in Transit's tariff filings were unjust and unreasonable.[17] It ruled that, as a condition precedent to any elevation of fares, Transit must generate $6.4 million in new capital and allocate it to debt retirement and bus purchases in designated amounts.[18] It directed that, pending compliance, Transit continue to charge the regular-route fares then in effect.[19] As already mentioned, Transit subsequently[20] applied for reconsidera-

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[13]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 15-16; *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 2, 9-12.

[14]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 15; *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 9.

[15]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 16; *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 9-11.

[16]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 16; *D. C. Transit Sys., Inc.* (Order No. 1219); *supra* note 6, at 2, 9-11.

[17]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 15-16; *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 9-11.

[18]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 17.

[19]*Id.* at 15.

[20]*Id.* at 17.

[20]On May 25, Transit notified the Commission that it believed Order No. 1216 to be invalid and that, unless enjoined, it intended to put the proposed fares into operation on May 27. Transit tells us that, to avoid resulting chaos, it invited the Commission to seek an immediate test of the order's validity and pledged its cooperation in such a venture. On the day following, the Commission sued for an

tion,[21] which by Order No. 1219 the Commission denied,[22] and the proceeding before us is for review of those orders.[23] We denied a motion by Transit for extraordinary relief pending review[24] and, with excellent cooperation from counsel, have expedited our consideration on the merits.

The Loconto Reports

In reaching its conclusions, the Commission drew heavily upon the results of an in-depth study of Transit's financial condition. The Commission had ordered the study made with a view to assessing the full implications and isolating the underlying causes of Transit's condition.[25] The study was made by Pasquale A. Loconto, a partner in a consulting firm employed by the Commission for the purpose. Loconto probed into Transit's financial history, analyzed its capital and debt structures, reached conclusions as to the need for improvements and formulated recommenda-

injunction. *Washington Metropolitan Area Transit Comm'n* v. *D. C. Transit Sys., Inc.*, Civ. No. 1061-72 (D. D. C.). See Compact, *supra* note 1, tit. II, art. XII, § 17(a). Another suit seeking similar relief was concurrently filed, *Murphy* v. *D. C. Transit Sys., Inc.*, Civ. No. 1060-72 (D. D. C.), and the two actions were consolidated. On June 1, the District Court enjoined violation of the order and, on the same day, Transit filed its application for reconsideration by the Commission. Appeals from the District Court's injunctive order are pending in this court.

[21] See Compact, *supra* note 1, tit. II, art. XII, § 16.

[22] *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 16, 18.

[23] See note 7, *supra*, and accompanying text.

[24] The motion sought an order staying operation of Orders Nos. 1216 and 1219 and permitting Transit's proposed fares to become effective. The Commission had previously denied a similar request, partly on the ground that it lacked authority to grant it. *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 16.

[25] The events precipitating the study—part of a formal investigation into Transit's financial situation—was Transit's inability to arrange financing for the purchase of new buses. *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 9; *D. C. Transit Sys., Inc.* (Order No. 1188) (WMATC) (Dec. 16, 1971) (not yet reported).

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tions as to the steps by which financial stability might be achieved.[26] Loconto prepared a report, which was placed in the administrative record, and he also appeared as an expert witness in the proceedings and stood cross-examination on the conclusions and recommendations of his report.[27] What we now summarize are the Commission's discussions of the report, and the findings it based thereon.

Loconto called attention to substantial increases in Transit's current and long-term liabilities and accompanying declines in reserves and retained earnings.[28] He also identified, as concomitants of steadily growing operating revenues, heightening operating revenue deductions, fluctuating operating income, and constantly rising interest expense[29]—the latter, by the Commission's appraisal, "a major contributing factor in Transit's poor profit picture."[30] A drop in Transit's current ratio—the relationship of current assets to current liabilities—"indicates an extreme lack of liquidity," said Loconto, and "little provision for uneveness in the flow of funds available to meet

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[26] *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 9.

[27] *Id.* Transit did not object to introduction of the report into evidence or the testimony Loconto gave.

[28] "[C]urrent liabilities of the company have increased since 1957 by $10.5 million to a current level of $14.7 million. Long-term payables are up from $5.4 million. Reserves and other liabilities declined from $12.1 million in 1957 to $3 million in 1970. Stockholders' equity consists of (1) $500,000 representing capital stock which amount has remained constant throughout the period, and (2) retained earnings which have decreased from a high of $3.8 million in 1964 to $1.5 million in 1971." *Id.* at 9-10.

[29] "The report also examines operating trends. Operating revenues have increased each year for a total increase of $22.5 million since the company began operation. Operating revenue deductions have also increased, that total increase being $23.3 million. Operating income during the period has ranged from a high of $2.3 million in one year to a low of a $48,000 loss in another. Interest expense has increased from $384,000 in 1957 to $1.4 million in 1970. The increasing interest expense has been a major contributing factor in Transit's poor profit picture." *Id.* at 10.

[30] See note 29, *supra*.

current liabilities."[31] "If," Loconto continued, "that flow should decline even temporarily, a condition of insolvency could conceivably result."[32] The ratio of Transit's debt to stockholders' equity, the relationship of funds generated by operations to interest coverage and long-term debt, and the percentage of stockholders' equity to total assets, as well as other relationships examined by Loconto, "similarly indicated a worsening financial picture for D. C. Transit."[33]

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[31] Loconto explained that "[c]urrent ratio is a measure of the liquidity of a company, or its ability to meet its current obligations. A ratio greater than one generally indicates the availability of current resources larger than current demands." Quoting R. Anthony, *Management Accounting* 300 (3d ed. 1964), he added that "[t]he current ratio . . . 'is not only a measure of liquidity but also is a measure of the margin of safety that management maintains in order to allow for the inevitable unevenness in the flow of funds through the current asset and liability accounts.'" In D. C. Transit's case, the drop was from 1.5 in 1957 to .2 in 1970. See *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 10.

[32] *Id.*

[33] "Another comparison he used was the comparison of total debt to stockholders' equity. This illustrates the relationship between the creditors' and the owner's investments in the assets of the company. This ratio has increased from 5.9 in 1961 to 18.1 in 1970. That degree of creditor interest in the assets of the company indicates, according to the report, a high degree of risk. Another test, interest coverage, was used to illustrate the ability of the company to meet interest payments with income operations. In 1957, funds generated were 4.2 times the rate of interest expense; in 1970 this had decreased to .7 times. From the point of view of a potential lender, this level was considered by Loconto to be very low. Finally, the comparison was made between funds generated by operations, after interest and taxes, to long-term debt not currently due and payable. This ration has declined in Transit due largely to the increase in long-term debt. It has ranged from a high of 60.2 percent in 1961 to a low of 3.7 percent in 1968 and was 14.9 percent in 1970. 'This means,' said Loconto, 'that at the current level of funds generation, it would take more than seven years to retire all the existing debt if all available funds were applied to this purpose.' . . . Another meaningful test presented was stockholders' equity as a percent of total assets. This ratio has decreased from a high of 14.4 percent in 1961 to 5.2 percent in 1970. This, again, was considered quite low. Other ratios and tests made by Loconto similarly indicated a worsening financial picture for D.C. Transit." *Id.* at 10-11.

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In Loconto's opinion, "[t]he combination of trends presented . . . indicates that the financial condition of the company has been steadily declining during recent years."[34]

Loconto's analysis of capital structure included a comparison with ten other privately-owned transit companies on a number of financial aspects.[35] These comparisons led to Loconto's conclusion "that the structure of the company is quite different from other companies in the industry" and that "[b]y all means, the differences are toward a structure that is more risky and less financially sound."[36] Loconto pointed out that a relatively large portion of Transit's assets were fixed and primarily nonoperating, generally yielding comparatively little return to Transit.[37] Loconto also noted that debt servicing requirements had increased with increasing debt, and that Transit, lacking sufficient funds from operations to meet those requirements, had been driven to "refinancing debt rather than paying it off."[38] "This refinancing practice," said the

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[34] *Id.* at 11.

[35] "With respect first to current ratio, the average of the comparison companies was 1.4, the lowest of the comparison companies being .5. D. C. Transit is .2, showing a much lower liquidity and smaller reserve for uneven flows of funds to meet current liabilities than any of the other companies. With respect to total debt to stockholders' equity, the highest of the comparison companies was 1.6 to 1; Transit is 18.1 to 1, eleven times higher than the highest of the comparison companies. Stockholders' equity as a percent of total assets indicated a much greater reliance on financing from sources other than the owners of D. C. Transit than in the comparison companies. The comparison of property, plant, and equipment to long-term debt and stockholders' equity indicated a heavier reliance on short-term financing to fund long-term assets, an undesirable and unsound practice." *Id.*

[36] *Id.* at 12.

[37] *Id.*

[38] "The Loconto analysis of debt disclosed that debt increased steadily until 1965, and since then has remained between $23 million and $26 million. The overall cost of debt is at 6.82 percent on the average. Debt servicing requirements have increased with the

Commission, "in turn creates what Loconto called a 'high risk' situation because there is the chance that the creditors will be unwilling to refinance the debt, will call it instead, and there will not be funds available to pay it."[39] There was also a mixture of short- and long-term debt disclosing the financing of long-term assets with short-term and intermediate-term financing—by the Commission's characterization, "a poor business practice."[40]

On the basis of his analysis, Loconto identified four problems fundamental to achieving financial stability in Transit's case. These the Commission described thusly:

> First, he said some correction must be made in the fact of excessive short-term debt in relation to long-term debt. Also requiring correction was the problem of the excessive debt in relation to stockholders' equity. Since debt service demands are fixed and must be met, while there is discretion in whether stockholders will receive return when earnings are insufficient, the debt-equity ratio should be reduced. The third area of concern was the fact of the excessive non-earning assets. The consultant noted that the earnings of these assets, largely subsidiary real estate corporations, were very small in relation to their value. He also noted that there are on the books of those subsidiaries $3.1 million in accounts receivable in the form of loans to affiliates and former affiliates. These loans apparently are non-interest bearing. Thus, there appear to be assets in the form of receivables of the subsidiary

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increase in debt. Since 1957 the debt servicing requirements have grown from under $1.3 million to $6.7 million annually. Operations have not produced sufficient funds to meet the debt servicing requirements since 1965, and the result has been that the company has been forced to meet the debt service requirements by refinancing debt rather than paying it off." *Id.* at 12.

[39] *Id.*

[40] *Id.*

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corporations which could be recalled and made available to the parent operating company.

The fourth problem is the inadequacy of funds provided by operations. This problem obviously can only be cured by increased farebox revenues or subsidization of farebox revenues from the taxpayer. However, the consultant points out that even a considerable increase in net income from this source would not be adequate to make principal payments due within the coming year, which are in excess of $5 million.[41]

Loconto also submitted specific recommendations designed to strengthen Transit's ailing financial situation: reduction of current liabilities by $5 million during the first future annual period and eventually by $11 million; reduction of long-term debt by $4 million during the future annual period and ultimately by $8 million; and the acquisition of $3 million for the purchase of new buses.[42] He suggested, as potential sources for the needed funds, the calling of $3 million lent by Transit's subsidiaries,[43] possible sale of properties classified as operating properties but actually nonoperating,[44] and an increase of paid-in capital.[45] The

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[41] *Id.* at 12-13.

[42] *Id.* at 13.

[43] As the Commission explained, Loconto had noted that Transit has assets, largely subsidiary real estate corporations, providing earnings that are very small in relation to their value, and

> that there are on the books of those subsidiaries $3.1 million in accounts receivable in the form of loans to affiliates and former affiliates. These loans apparently are non-interest bearing. Thus, there appear to be assets in the form of receivables of the subsidiary corporations which could be recalled and made available to the parent operating company.

Id. at 12-13.

[44] The record shows that Loconto had reported that Transit owns real estate which is not used in its operations and which might provide funds up to $3.6 million on disposition. Loconto also had pointed to possible disposition of other assets, valued at $13 million, owned by Transit's subsidiaries.

[45] *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 13.

latter step, it was said, "might well be justified because the initial capitalization was 'exceedingly small' and dividends of $4.4 million were paid out despite the fact that Transit had a low level of stockholders' equity."[46]

The Commission's Orders

By the Commission's assessment, "the record show[ed] clearly and in great detail Transit's seriously unstable and risky financial condition,"[47] and this, the Commission found, bred an uneconomical and inefficient transportation operation and a resulting deterioration in service.[48] The Commission summarized:

> The record here shows that the present capital structure and debt structure of Transit do not reflect economic and efficient management. Non-operating assets have not been employed as advantageously to the parent operating company as prudent management practice would dictate. Under its current capital and debt structures, Transit is unable to provide and replenish the basic tools of its trade, its rolling stock. Its chronic cash-short condition results in too few drivers, too few mechanics, too few bus cleaners, and too high an incidence of failure to provide basic service. We consider that less than efficient management. The unnecessarily high debt service requirement is uneconomic. Operating on the brink of insolvency is surely not efficient and economic.[49]

The Commission further elucidated the connection between Transit's financial instability and its mediocre operation

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[46] *Id.*

[47] *Id.* at 14.

[48] See *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 1.

[49] *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 15.

and service by adverting to specific examples. Two years previously, the Commission had granted Transit a 25 percent increase [80] in the basic District of Columbia fare, and had concurrently ordered Transit to escrow $620,000 over a six-month period as a 20 percent downpayment on the purchase of 85 new buses.[81] Transit never acquired the buses, admittedly for the reason that it was unable to obtain an 80 percent extension of credit.[82] While some financing was available with a downpayment approaching 50 percent, the escrow fund would have enabled acquisition of only 35 buses on those terms.[83] In the meantime, Transit's bus fleet aged considerably, with the adverse consequences inevitably attendant upon operation of antiquated buses.[84] As previously stated,[85] the Commission noted that Transit's too-small working capital has resulted in too few drivers, mechanics and bus cleaners, and consequent shortcomings in its service.[86] Overall, the Commis-

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[80]From 32 cents to 40 cents, the current fare.

[81]*D. C. Transit Sys., Inc.* (Order No. 1052), 85 P. U. R. 3d 1, 13, 29-30, *rehearing denied*, (Order No. 1057), 85 P. U. R. 3d 33 (1970).

[82]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 9.

[83]*Id.*

[84]By the Commission's description, in its order denying reconsideration,

> The average age of a Transit bus has risen from 6.96 years as of December 31, 1966 to 9.79 years as of September 30, 1971. We know that older buses are less comfortable for the passenger. More importantly, old buses have a higher incidence of mechanical and equipment failure than newer equipment, thereby providing the public with a less reliable, and consequently less adequate, transportation service. Coupled with the company's failure to employ sufficient drivers, mechanics and cleaners, and the marked increase in trips not operated, this is another factor which directly and materially impacts upon the adequacy of its service.

D. C. Transit Sys., Inc. (Order No. 1219), *supra* note 6, at 11 n. 11.

[85]See text *supra* at note 49.

[86]The Commission's order on reconsideration further elucidates: Reports which Transit has filed with us, and which we officially

sion found that "the continued deterioration of the company's cash position has already caused a substantial deterioration in the service which it offers the public,"[87] and "that unless this situation [is] remedied, service will continue to deteriorate to *unacceptable* levels."[88]

The Commission further found that Transit's "uneconomical and inefficient method of operation, and the resulting deterioration in service, could not be remedied merely with a fare increase,"[89] and its orders delineated justifications. As it said on reconsideration,

> Transit's financial instability is due largely to management decisions which are the critical factors in creating the present unsatisfactory financial structure. The Loconto report and testimony identified corporate decisions, not inadequate fare revenues, as the major factor in Transit's present financial instability. We concluded that additional funds, not increased fares

note, show a marked deterioration in the company's service. During May 1971, the company's driver force was only 16.8 below quota on a weekly average of 6.2 drivers-in-training. During May of this year, by contrast, the company was 42.7 drivers under quota on a weekly average, and had only a weekly average of 2.5 drivers-in-training. That this has impacted seriously on the adequacy of the company's service is clearly shown by the number of trip-blocks not operated:

1971		*1972*	
Week Of	*Trip Blocks Not Operated*	*Week Of*	*Trip Blocks Not Operated*
May 2	57	May 7	106
May 9	27	May 14	73
May 16	28	May 21	132
May 23	45	May 28	191
May 30	54		

A "trip block" represents the trips scheduled to be operated by a single bus on a single day.

[87] *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 10 n. 10.
[88] *Id.* at 9-10 (footnote omitted).
[89] *Id.* at 11 (emphasis in original).
[90] *Id.* at 1.

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> alone, were required to remedy this situation. Here again, the expert testimony showed that the company's major need was additional funding from sources other than the farebox, and, as we made clear in Order 1216, we agree.[80]

The Commission also discovered that its efforts to set fares which would meet the Compact's guidelines[81] "has produced only frustration. For any fare that would cover reasonable expenses and provide a reasonable return would clearly not provide either the form or the substance of financial stability."[82] The Commission further concluded that it could not

> assure, simply by adjusting the fare, the continued adequacy of the company's service. Experience, particularly since the last fare increase of July 1970, and the facts of record submitted in this case, demonstrate that even if the fare were to be increased in the full amount requested by D. C. Transit, little if any improvement could be expected in what has been shown to be the very unstable financial condition of this company.[83]

This state of affairs, Transit's application for higher fares posed something of a dilemma for the Commission. In its words,

> What we see in the future if we increase the fare and do nothing more, is continued instability and a deterioration in the level and quality of service offered. In these circumstances, raising the fare would

[80] *Id.* at 9.

[81] The guidelines referred to are the Compact requirements regarding economical and efficient operation and adequate service, more fully discussed in Part III, *infra*.

[82] *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 8.

[83] *Id.*

be asking the ratepayer to meet his obligation to the company without requiring the company to meet its obligation to the ratepayer. We do not perceive the Compact or the Constitution as imposing a unilateral obligation on the ratepayer. Rather, we believe that the ratepayer and the company have a reciprocal obligation. We believe that obligation requires that the company give evidence that it can perform the services expected of it so that the ratepayer, in return for his contribution, will receive full value in the form of full services.[64]

The Commission then arrived at what it believed to be "the overriding and threshold question that we face in this case [:] can financial stability be restored to this company so that we may establish a rate which is 'just and reasonable' to all concerned?" [65] In the Commission's judgment, "the answer lies in the willingness of the company to alter the capital and debt structures of the company in the manner suggested by the Loconto report, i.e. through the application of funds needed to correct the financial imbalance Loconto identified." [66]

Thus the Commission came to frame directives to achieve the solution it deemed appropriate. Referring to the Loconto recommendation that $12 million be infused into Transit's capital structure during the future annual period,[67] the Commission was "fully agree[d] that debt must be reduced, not increased, and therefore new buses should be purchased for cash." It accordingly set $3 million for that purpose.[68] Because Transit already held $620,000

[64] *Id.* at 14.
[65] *Id.* at 15.
[66] *Id.*
[67] This recommendation, as the Commission reiterated, took into account $3.5 million in additional revenues anticipated from the proposed fares, leaving $8.5 million to be secured from other sources. *Id.*
[68] *Id.*

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in escrow for bus purchases, this meant a net of $2.4 million.[69] Additionally, the Commission specified $4 million for reduction of outstanding debt.[70] The aggregate of $6.4 million, the Commission ruled, will be a precondition to any increase in fares.[71] It explained:

> In the past, when we have directed the company to take certain actions, performance has not always been forthcoming. This is most notably true in the bus purchase program.[72] We have no confidence that if we were to require the company to produce new revenue as a concurrent condition with granting a fare increase the new capital would be produced. Transit's attempt to assure us that they are taking some steps to correct the capital and debt situation are not sufficient. We will require assurances in the form of actual performance.[73]

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[69] *Id.*

[70] *Id.* The Commission explained that it was "requiring something less than the full amount recommended by Loconto because we are allowing a limited period for the deposit of $2.4 million into escrow for buses and the reduction of debt by $4 million." *Id.*

[71] *Id.*

[72] See text *supra* at notes 50-54.

[73] *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 15. The dissenting commissioner emphasized the fact that Transit's expenses exceed its revenues. *D. C. Transit Sys., Inc.* (Order No. 1216-A) (WMATC May 25, 1972) (not yet reported), at 1. That, he felt, was "a condition which requires corrective action by the Commission," *id.* at 1, and that under both the Compact and the Constitution "it is mandatory for our Commission to permit Transit the opportunity to earn a *reasonable* profit on its operations." *Id.* (emphasis in original) See also *id.* at 3-4. Other points advanced by the dissent were that the majority's directive to augment Transit's capital "amounts to an encrouchment [*sic*] on the prerogative of Management," *id.* at 2; that the majority's heavy reliance on Mr. Loconto's findings and recommendations was unwarranted, *id.*; that the remedy for Transit's past noncompliances with Commission orders was enforcement in court, *id.* at 3; and that Order No. 1216 was an impermissible extension of the suspension period authorized by the Compact, *id.* at 4.

The Issues

In succeeding parts of this opinion, we deal with the issues Transit tenders for decision. We have arranged them in a logical progression of inquiries, grouped in three categories. Those in the first group relate to the procedural regularity of the Commission's action. Was the Commission compelled to establish a lawful fare for the future, or was it free to promulgate an order of another type, within the period for which it suspended Transit's tariffs? Could the Commission, in exercising its rate-making powers, permissibly investigate the economy and efficiency of Transit's operation and the adequacy of its service? Could the Commission, upon finding that economical, efficient and adequate transportation was not being afforded, direct corrective measures as a condition precedent to further consideration of a fare increase? We examine these problems in Part II. The next several issues involve the substantive validity of the orders. Do the reasons assigned for the Commission's directives survive claims that they lack evidentiary support? Do the Commission's findings pass muster? Were the Commission's preconditions legally warranted by the circumstances proven and found? We treat these matters in Part III. The last issue concerns the constitutional validity of the orders. Does due process of law require a regulatory agency to grant at least a break-even fare to a carrier found to be in default of its obligation to provide economical, efficient and adequate transportation? We resolve that question in Part IV.

II. PROCEDURAL VALIDITY OF THE ORDERS

Responsibility for Action Within Suspension Period

The Compact specifies mechanics for Commission consideration of fare changes proposed by regulated carriers. The process commences with the carrier's filing of a new

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tariff showing the changes it contemplates.[74] The tariff must state the date on which it will take effect, which cannot be less than 30 days after the date of filing without authorization by the Commission.[75] Prior to the effective date of the change, however, the Commission may suspend the new fares for an initial period terminating 90 days after the date on which those fares would otherwise have gone into effect.[76] The Commission may also extend the suspension period to a maximum of 120 days from the original suspension date.[77] The Compact provides that

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[74]Compact, *supra* note 1, tit. II, art. XII, § 5(e). Carriers are required to file with the Commission, and to keep open to public inspection, tariffs showing their fares and regulations and practices affecting fares, § 5(a), and are prohibited from charging any other fares, § 5(d).

[75]Compact, *supra* note 1, tit. III, art XII, § 5(e).

[76]"The Commission, upon complaint or upon its own initiative, may suspend any fare, regulation, or practice shown in a tariff filed with it under Section 5 (except a tariff to which Section 5(b) applies), at any time before such fare, regulation, or practice would otherwise take effect. Such suspension shall be accomplished by filing with the tariff, and delivered to the carrier or carriers affected thereby, a notification in writing of such suspension. In determining whether any proposed change shall be suspended, the Commission shall give consideration to, among other things, the financial condition of the carrier, its revenue requirements, and whether the carrier is being operated economically and efficiently. The period of suspension shall terminate ninety (90) days after the date on which the fare, regulation, or practice involved would otherwise go into effect, unless the Commission extends such period as provided in paragraph (2)." Compact, *supra* note 1, tit. II, art. XII, § 6(a)(1). The exception referred to is for fares charged by carriers at the time the Compact became effective.

[77]"If, after hearing held upon reasonable notice, the Commission finds that any fare, regulation or practice relating thereto, so suspended is unjust, unreasonable, or unduly preferential or unduly discriminatory either between riders or sections of the Metropolitan District, it shall issue an order prescribing the lawful fare, regulation, or practice to be in effect. The fare, regulation, or practice so prescribed shall take effect on the date specified in such order. If such an order has not been issued within the ninety (90) day suspension period provided for in paragraph (1), the Commission may from time to time extend such period, but in any event the

"[i]f, after hearing held on reasonable notice, the Commission finds that any fare . . . so suspended is unjust, unreasonable, or unduly preferential or unduly discriminatory either between riders or sections of the Metropolitan District, it shall issue an order prescribing the lawful fare . . . to be in effect."[78] The Compact further provides that "[i]f no such order is issued within the suspension period (including any extension thereof) the fare . . . involved shall take effect at the termination of such period."[79]

As we have mentioned, the Commission suspended Transit's alternate new-fare proposals for the full 120-day period permitted by the Compact. The parties are agreed, as are we, that the Compact then required the Commission to promulgate, within that period, an order which either (1) approved the new fares of which (2) appropriately (a) found these fares to be unlawful because "unjust, unreasonable, or unduly preferential or unduly discriminatory" and, in the latter event, which (b) proceeded to prescribe the "lawful rate."[80] Transit contends that the orders under review are invalid because they do not establish a "lawful fare" to be put into effect by the end of the authorized suspension period. The consequence, Transit argues, is that as a matter of law "the fare . . . involved"—

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suspension period shall terminate, no later than one hundred and twenty (120) days after the date the fare, regulation or practice involved was suspended. If no such order is issued within the suspension period (including any extension thereof), the fare, regulation or practice involved shall take effect at the termination of such period." Compact, *supra* note 1, tit. II, art. XII, § 6(a)(2). See also *Payne* v. *Washington Metropolitan Area Transit Comm'n*, 134 U.S.App.D.C. 321, 327-29, 415 F. 2d 901, 907-09 (1968).

[78]Compact, *supra* note 1, tit. II, art. XII, § 6(a)(2), quoted *supra* note 77.

[79]Compact, *supra* note 1, tit. II, art. XII, § 6(a)(2), quoted *supra* note 77.

[80]See notes 76-77, *supra*.

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the fare proposed by Transit[81]—automatically went into effect upon the expiration of that period.

We cannot accept Transit's theory. Within the suspension period indulged by the Compact, the Commission conducted and completed large-scale hearings on the new tariffs submitted by Transit and, by Order No. 1216, announced its decision as to those tariffs. In that order, the Commission found that Transit was derogating from its Compact obligation to furnish economical, efficient and adequate transportation service,[82] and that, for that reason, Transit was not entitled to an adjustment of its fares upward unless and until it remedied the deficiencies.[83] As Order No. 1216 expressly states, the Commission thus found that, under those circumstances, "the fares proposed . . . by D.C. Transit System, Inc., [are] unjust and unreasonable." [84] Beyond that, the Commission not only turned down the increases sought by Transit but also specified the conditions which Transit must satisfy as a prerequisite to further consideration of any increase;[85] and Order No. 1216 directs "[t]hat D.C. Transit System, Inc., shall continue to charge the regular route fares presently in effect."[86] That, we think, was necessarily a conclusion that the existing fare—that previously established by the Commission—was the "lawful fare" that must continue in force until those conditions are met and a further fare order is promulgated.[87]

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[81]We assume that Transit refers to the 50-cent fare with free transfers specified in its first alternate tariff rather than the 45-cent fare plus 5-cent transfer charge proposed in its second alternate.

[82]See text *supra* at notes 47-58.

[83]See text *supra* at notes 59-64.

[84]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 17.

[85]See text *supra* at notes 67-71.

[86]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 17.

[87]Transit counters the Commission with the argument that since the latter foresaw a probable need for some fare increase after Transit's compliance with the Commission's precondition, the existing

That disposition accords with what we believe the Compact signatories had in mind when they formulated the scheme for Commission handling of new-fare applications. It seems clear that the time limitations on suspensions were designed to assure that the Commission would act on the carrier's proposals in some appropriate fashion within the 120-day period. It appears equally obvious that those limitations do not afford a guaranty that the ratemaking process will necessarily run its full course during that period.[89] The Commission is required to complete its

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fares could not be the "lawful fare" to continue in effect. If this position is correct, the Commission could never precondition consideration of higher fares unless the precondition is satisfied within the suspension period. As will appear, we reject that reading of the Compact. See text *infra* at notes 89-91. And as we later hold, neither the Compact nor the Constitution compels an award of a fare increase to a carrier seriously defaulting in performance of its obligations to the public.

[89] So much is immediately apparent from the fact that Commission orders emanating within a suspension period may be and frequently are subjected to judicial review. This Court has never felt that the ratemaking proceeding was so far ended that the fares proposed became automatically operative during a period consumed either by judicial review or by further Commission consideration necessitated by the decision on review. The Compact, *supra* note 1, tit. II, art. XII, § 17, makes it perfectly plain that the period for judicial review is not part of the restricted period of permissible Commission suspension, and the same conclusion must follow as to the period covered by any ensuing remand. When, in the past, we have found Commission error, we have pointed it out and remanded to the Commission for appropriate Commission action. *E.g., D. C. Transit Sys., Inc.* v. *Washington Metropolitan Area Transit Comm'n,* 121 U.S.App.D.C. 375, 350 F. 2d 753 (*en banc* 1965); *Williams* v. *Washington Metropolitan Area Transit Comm'n,* 134 U.S.App.D.C. 342, 415 F. 2d 922 (*en banc* 1968), *cert. denied,* 393 U. S. 1081 (1969). That, of course, is because we do not sit to fix fares, but rather to pass on the procedural and substantive propriety of Commission orders. *Williams* v. *Washington Metropolitan Area Transit Comm'n, supra,* 134 U.S.App.D.C. at 362-63, 415 F. 2d at 942-43. Transit does not suggest that those remands were unlawful. The instant case summons no different principle. If Transit were to prevail on the merits, it would become entitled only to an order remanding the case to the Commission with directions that identified error be rectified and a "lawful fare" be then established.

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investigation of proposals and to render its decision within the Compact period. Where the hearings on the proposals develop satisfactorily the basis for outright approval or disapproval of new fares, the Commission is obligated to so decide, and to do so within the time the Compact specifies.

Where, however, the hearings firmly establish the need for action by the carrier as a precondition to a fare change, it becomes the Commission's responsibility to make, within the mandated period, an order to that effect. The Compact empowers the Commission not only to unconditionally grant or deny request for new fares, but also "to . . . issue . . . such orders . . . as it may find necessary or appropriate to carry out [the Compact's] provisions. . . ."[89] That authorization imparts to the Commission's ratemaking process more than enough flexibility to accommodate needs to implement the specific demands of the Compact by orders tailored to the exigencies of particular cases.[90] Here, by the Commission's analysis, improved service and higher fares were interrelated problems demanding contemporaneous treatment,[91] and as is evident could not possibly be accommodated within the suspension period. Furthermore, the Commission found that "until a new capital structure and debt structure are established, we cannot determine certain elements in the ratemaking formula. . . ."[92] We hold that where, as here, the Com-

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[89]"The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. . . ." Compact, *supra* note 1, tit. II, art. XII, § 15.

[90]See *Payne* v. *Washington Metropolitan Area Transit Comm'n*, *supra* note 77, 134 U.S.App.D.C. at 334-42, 415 F. 2d at 914-22. As we have indicated, the order may, in appropriate circumstances, continue the existing fare as "the lawful fare to be in effect." See text *supra* at note 87.

[91]See text *supra* at note 64.

[92]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 16.

mission had found a carrier remiss in its obligations to the traveling public, the Compact does not interpose an inexorable barrier to promulgation, within the time limits fixed, of an appropriate remedial order, nor does it automatically put proposed new fares into operation upon expiration of the period for which they were suspended.

Interrelationship of Service and Ratemaking Obligations

Interpreting pertinent provisions of the Compact,[93] the Commission held that it is "required, in passing upon a rate application, to consider and weigh not only the interests of the company, including its right to a reasonable return on its investment, but also the interests of the public, including the public's right to economical, efficient and adequate transportation services."[94] This construction by the Commission of its own authorizing legislation would in any event command substantial deference in the courts.[95] In our view, derived upon independent investigation, it is eminently correct.

The Compact directs and empowers the Commission to proscribe "just and reasonable fares,"[96] an entitlement immensely valuable to the carriers it regulates.[97] But the

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[93]Compact, supra note 1, tit. II, art. XII, §§ 6(a)(3), 6(a)(4).

[94]*D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 4-5. See, to similar effect, *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 14-15.

[95]*Udall* v. *Tallman*, 380 U. S. 1, 4 (1965); *Power Reactor Dev. Co.* v. *Electrical Workers Int'l*, 367 U. S. 396, 408 (1961); *Unemployment Compensation Comm'n* v. *Aragon*, 329 U. S. 143, 153 (1946); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945).

[96]Compact, *supra* note 1, tit. II, art. XII, § 6(a)(3). Concomitantly, it is "the duty of every carrier to . . . establish, observe, and enforce just and reasonable individual and joint fares. . . ." Compact, *supra* note 1, tit. II, art. XII, § 3.

[97]"A 'just and reasonable' rate is one that assures that all the enterprise's legitimate expenses will be met, and that enables it to cover interest on its debt, pay dividends sufficient to continue to

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Compact also specifies that "[i]n the exercise of its power to prescribe [such] fares, . . . the Commission shall give due consideration" to four enumerated factors, among others,[98] two of which have special relevance to the issue at hand. One is "the need, in the public interest, of adequate and efficient transportation service by [regulated] carriers at the lowest cost consistent with the furnishing of such service."[99] The other is "the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service."[100] The parties to the Compact could hardly have more plainly mandated the well settled principal that ratemaking appropriately encompasses an examination and evaluation of the economy and efficiency of a public utility's operations[101] and the adequacy of its service.[102]

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attract investors, and retain a sufficient surplus to permit it to finance downpayments on new equipment and generally to provide both the form and substance of financial strength and stability." *D. C. Transit Sys., Inc.* v. *Washington Metropolitan Area Transit Comm'n*, *supra* note 88, 121 U. S. App. D. C. at 400, 350 F. 2d at 778.

[98]"In the exercise of its power to prescribe just and reasonable fares and regulations and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service." Compact, *supra* note 1, tit. II, art. XII, § 6(a)(3).

[99]See note 98, *supra*. It is also "the duty of every carrier to furnish transportation subject to this Act as authorized by its certificate and . . . to provide safe and adequate service, equipment, and facilities in connection with such transportation." Compact, *supra* note 1, tit. II, art. XII, § 3.

[100]See note 98, *supra*. See also Compact, *supra* note 1, tit. II, art. XII, §§ 6(a)(1), 6(a)(4).

[101]*E.g.*, *Key Sys. Transit Lines*, 17 P. U. R. 3d 505, 509 (Cal. Pub. Util. Comm'n 1957) (rate increase denied; by refusing to build necessary new facilities, company was unlawfully denying itself a

It is equally clear that the obligations of carrier and rider here at stake are interrelated and reciprocal. The carrier's responsibility is "adequate and efficient trans-

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reasonable opportunity to earn a fair return on its property devoted to public use; styling its order as interim, the Commission intended it to apply only as long as the conditions were not complied with); *D. C. Transit Sys., Inc.* (Order No. 4480), 25 P. U. R. 3d 371, 378 (D. C. Pub. Util. Comm'n 1958) (rate increase accompanied by admonition that proof of economical management as well as provident control of expenditures will be necessary before authorization of any further increase); *Mountain States Tel. & Tel. Co.*, 13 P. U. R. 3d 560, 563 (Idaho Pub. Util. Comm'n 1956) (rate increase denied; necessary equipment alterations were undertaken belatedly at labor costs exceeding those which company would have incurred had work been done earlier); *Summitville Water Co.* 1921A P. U. R. 616, 617-18 (Ind. Pub. Serv. Comm'n 1920) (rate increase denied; impossible to ascertain operating conditions of company from its financial records because they were so inefficiently maintained); *Maine Pub. Utils. Comm'n* v. *Bangor Gas Co.* 74 P. U. R. (n. s.) 23, 28-29 (Me. Pub. Util. Comm'n 1948) (rate increase authorized, but not to become effective until company completed necessary improvements); *Lexington Water Co.*, 1928E P. U. R. 322, 345-46 (Mo. Pub. Serv. Comm'n 1928) (rate increase authorized, accompanied by orders that company cease providing an unsatisfactory water system and begin to operate efficiently); *West Ohio Gas Co.*, 1928C P. U. R. 385, 392-93 (Ohio Pub. Util. Comm'n 1928) (rate increase denied; operating inefficiently and ignoring public needs); *Northwestern Bell Tel. Co.*, 20 P. U. R. 3d 385, 396 (S. D. Pub. Util. Comm'n 1957) (rate increase denied; management decision to operate at low debt-capital structure was expensive for ratepayers).

See *Southern Bell Tel. & Tel. Co.*, 26 P. U. R. 3d 55, 75-77, 111 (La. Pub. Util. Comm'n 1958), *rev'd*, 28 P. U. R. 3d 303 (La. D. C. 1958), *aff'd*, 239 La. 372, 188 So. 2d 372 (1960), which collects authorities supporting the principle that rate-making includes an examination and evaluation of the economy and efficiency of a public utility's operation and management; and *Los Angeles Ry. Corp.*, 1928D P. U. R. 75, 78 (Cal. R. R. Comm'n 1928); *Leavenworth*, 1915B P. U. R. 611, 636 (Kan. Pub. Serv. Comm'n 1915); *Breaux Bridge Tel Co. Inc.*, 41 P. U. R. 3d 260, 262 (La. Pub. Serv. Comm'n 1961); *Durham Tel. Co.*, 14 P. U. R. 3d 57, 67 (N. C. Util. Comm'n 1956); *Dakota Util. Co.*, 1922C P. U. R. 805, 809 (N. D. Bd. of R. R. Comm'n 1922).

[**] *Riverside Grove Water Co., Inc.*, 20 P. U. R. 3d 117, 120 (Calif. Pub. Util. Comm'n 1957) (minimum system improvements required before increase would be put in effect); *Parker*, 19 P. U. R. 3d 400, 403 (Ga. Pub. Serv. Comm'n 1957) (fares, reduced because quality of service was poor, could be restored 60 days there-

portation service" at the cheapest fares feasible,[186] and the rider's is to pay no more.[187] The carrier is entitled to revenues enabling provision of that service, but only to the extent needed under "honest, economical, and efficient management."[188] It is not entitled under the Compact to a fare raise irrespective of the quality of its operation and service. As the Commission, consistently with the weight

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after if substantial improvement was demonstrated or could be reduced again if service deteriorated further); *Midwest Tel. Co., Inc.*, 23 P. U. R. 3d 26, 31 (Ind. Pub. Serv. Comm'n 1958) (general rate increase authorized, withheld as to one region until service was upgraded and inspected and certified to be adequate); *Northern Mo. Tel. Co., Inc.*, 49 P. U. R. 3d 313, 317 (Mo. Pub. Serv. Comm'n 1963) (rate increase denied until rehabilitation of system and modern, adequate facilities were installed); *Western Light & Tel. Co., Inc.*, 10 P. U. R. 3d 70, 76 (Mo. Pub. Serv. Comm'n 1955) (increase denied until company could show that substandard service had been improved); *Blair Tel. Co.*, 51 P. U. R. 3d 262, 264 (Neb. St. Ry. Comm'n 1963) (increase permitted only after equipment was replaced); *New York Tel. Co.*, 84 P. U. R. 3d 321, 356-57 (N. Y. Pub. Serv. Comm'n 1970) (quality of service included in determination of reasonable rates); *Western Light & Tel. Co.*, 17 P. U. R. 3d 422, 428-29 (Okla. Corp. Comm'n 1957) (quality of service included in rate determination).

See Long Beach Motor Bus Co., 12 P. U. R. 3d 198, 201-02, 204 (Calif. Pub. Util. Comm'n 1954); *Rockville Water & Aqueduct Co.*, 78 P. U. R. 3d 45, 51 (Conn. Pub. Util. Comm'n 1968), *rehearing denied*, 78 P. U. R. 3d 53 (Conn. Pub. Util. Comm'n 1969); *Indiana Assoc. Tel. Co.*, 88 P. U. R. (n.s.) 196, 200-01 (Ind. Pub. Serv. Comm'n 1950); *United Corp.*, 1931B P. U. R. 497, 502-04 (Ind. Pub. Serv. Comm'n 1930); *Ocean County Gas Co.*, 1919B P. U. R. 874, 880-81 (N. J. Bd. of Pub. Util. Comm'n 1918); *Salt Lake City Lines*, 4 P. U. R. 3d 144, 149 (Utah Pub. Serv. Comm'n 1954).

[186]See text *supra* at note 99.

[187]The Commission is thus required to see to it that the fare-payers pay no more than is necessary to ensure the continued adequacy of the company's service and provide a return to the shareholders that is reasonable under the circumstances." *D. C. Transit Sys., Inc.* v. *Washington Metropolitan Area Transit Comm'n*, *supra* note 88, 121 U. S. App. D. C. at 402, 350 F. 2d at 780.

[188]See text *supra* at note 100.

of administrative[195] and judicial[197] authority elsewhere, declared:

> Upon a showing that it is now providing, and may in the future reasonably be expected to continue to provide, the economical, efficient and adequate transportation service to which the public is entitled, the carrier, in turn, is normally entitled to a fare which will produce a reasonable return. But where, as in this case, the record demonstrates that the carrier is in default with respect to its obligations under Section 6(a)(3) of the Compact, it is not entitled to a fare increase as a matter of law.[198]

The Commission has both the authority and the duty to assure that this reciprocity is maintained in practice. We have had occasion in the past to point out that the mandate that "just and reasonable fares" be set is itself "a standard which has invariably imposed an obligation to balance the interests of both the utility and the consumers."[199] As the Compact makes evident, the Commission's charge extends to the caliber of the carrier's opera-

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[195] *Key Sys. Transit Lines*, *supra* note 101, 17 P. U. R. 3d at 309; *Parker*, *supra* note 102, 19 P. U. R. 3d at 403; *Northern Mo. Tel. Co., Inc.*, *supra* note 102, 49 P. U. R. 3d at 317; *Western Light & Tel. Co., Inc.*, *supra* note 102, 10 P. U. R. 3d at 76. See notes 101-02, *supra*.

[197] *State* v. *Morgan*, 277 N. C. 255, 177 S. E. 2d 405, 412 (1970) (fare increases, granted by Commission and affirmed by court of appeals, reversed by North Carolina Supreme Court, holding that Commission had improperly failed to examine and evaluate inadequate services); *United Tel. Co.* v. *Mayo*, 215 So. 2d 609, 610 (1968), *appeal dismissed*, 394 U. S. 995 (1969) (Commission decision withholding rate increase pending service improvements affirmed). *Cf. Lakewood* v. *Lakewood Water Co.*, 54 N. J. Super. 371, 148 A. 2d 885, 890-92 (1959).

[198] *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 5.

[199] *D. C. Transit Sys., Inc.* v. *Washington Metropolitan Area Transit Comm'n*, *supra* note 88, 121 U. S. App. D. C. at 389, 350 F. 2d at 766 (emphasis in original).

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tion and service as well as to the financial reasonableness of the fares it collects.[110] In the Commission's view, its "responsibility to protect the public interest is at least equal to [its] obligation to consider [the carrier's] interest."[111] In our own view, it is certainly no less.[112]

Authority to Precondition Fare Increase

The Commission is amply authorized to take action reasonably necessary to insure the performance of obligations which the Compact imposes on carriers. The Compact provides that it "shall be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof."[113] As we have noted, the Compact also confers upon the Commission "power to . . . issue . . . such orders . . . as it may find necessary or appropriate to carry out" its provisions.[114] Like the Commission, we find within the Compact a positive mandate, applicable to ratemaking proceedings as well as others, that carriers provide, economically and efficiently, adequate transportation for the traveling public.[115]

The orders under attack precondition further Commission consideration of any new fare increase for Transit upon the latter's acquisition of new capital in substantial amount.[116] Satisfaction of that precondition, in the Commission's judgment, is essential to the economical and

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[110]See text *supra* at notes 98-102.

[111]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 7. *Cf. Smyth* v. *Ames*, 169 U. S. 466, 545 (1897).

[112]*See Moss* v. *CAB*, 139 U. S. App. D. C. 150, 151, 430 F. 2d 891, 902 (1970).

[113]Compact, *supra* note 1, tit. 1, art. XI(2).

[114]Compact, *supra* note 1, tit. II, art. XII, § 15, quoted in relevant part *supra* note 89.

[115]See text *supra* at notes 96-112.

[116]See text *supra* at notes 67-73.

efficient provision of adequate transportation to Transit's patrons.[117] Transit argues that nonetheless a precondition order was beyond its regulatory authority. We disagree.

Nobody seems to doubt the Commission's power to promulgate an order which simply directs a carrier to take measures necessary and appropriate to fulfillment of the Commission's responsibilities.[118] Nor is there room for doubting the validity of an order which gives such a direction concurrently with a grant of a fare increase;[119] indeed, the Commission has frequently issued orders of that type.[120] The sole question at this point is whether

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[117]See text *supra* at notes 59-73.

[118]See note 120, *infra*. See also *Southern Gulf Util. Co.*, 88 P. U. R. 3d 159 (1970), *modified*, 89 P. U. R. 3d 448, 451-52 (Fla. Pub. Serv. Comm'n 1971); *Key Sys. Transit Lines*, *supra* note 101, 17 P. U. R. 3d at 511; *Parker*, *supra* note 102, 19 P. U. R. 3d at 403.

[119]See note 120, *infra*. *Long Beach Motor Bus Co.*, *supra* note 102, 12 P. U. R. 3d at 202, 204-05 (increase conditioned on service improvement); *General Tel Co.*, 28 P. U. R. 3d 452, 455 (Ga. Pub. Serv. Comm'n 1969) (rate increase granted but in certain areas it was conditioned on service improvement); *Ocean County Gas Co.*, *supra* note 102, 1919B P. U. R. at 881 (increase conditioned upon rendering of continuous safe, adequate, and proper service as contemplated by New Jersey statute); *Poughkeepsie & W. Falls R. Co.*, 1920C P. U. R. 995, 998 (N. Y. Pub. Serv. Comm'n 1920) (increase conditioned on cut-back in management expenses and salaries of general officers by 50%); *Salt Lake City Lines*, 4 P. U. R. 3d 144, 149-50 (Utah Pub. Serv. Comm'n 1954) (increase conditioned on company taking immediate steps to make a survey and report findings promptly as to service improvements); *Norwalk Independent Tel. Co.*, 27 P. U. R. 3d 17, 19 (Wis. Pub. Serv. Comm'n 1959) (increase conditioned on company expending not less than four times the pro forma net revenues for plant repairs in current year).

[120]*See WMA Transit Co.* (Order No. 1127) (March 24, 1971) (not yet reported), at 23 (hire safety consultant, implement improved procedures to repair air conditioners and utilize radio system); *Alexandria, Barcroft & Wash. Transit Co.* (Order No. 1101) (Nov. 13, 1970) (not yet reported), at 24-25 (allocate funds for a marketing and promotion program; institute direct service on specified routes); *D. C. Transit Sys., Inc.* (Order No. 1052), *supra* note 51,

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the Commission can insist upon compliance with such a condition prior to further treatment of an application for approval of higher fares. We answer that question in the affirmative.

Preconditions to fare increases designed to assure quality of service have long been recognized. More than a half-century ago, the Commission's predecessor, the Public Utilities Commission of the District of Columbia, turned down an otherwise justified fare increase on a showing of inadequacy of the Carrier's Service notwithstanding that operating losses were inevitable without the increase.[121] Since then, commentators have advocated such preconditions,[122] and regulatory agencies have imposed[123]

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85 P. U. R. 3d at 12, 28 (Transit ordered to purchase buses); *W. V. & M. Coach Co.* (Order No. 1037) (April 23, 1970) (not yet reported), at 21 (employ additional supervisors and traffic checkers; expand telephone information services); *D. C. Transit Sys., Inc.* (Order No. 773), 72 P. U. R. 3d 113, 133 (1968) (depreciation adjustment made contingent on Transit's compliance with order to purchase buses contained in same order); *D. C. Transit Sys., Inc.* (Order No. 245), 48 P. U. R. 3d 385, 406, 416 (1963) (Commission directed Transit to order 82 new air-conditioned buses to be in service on or before October 1, 1963). *Cf. Southeast Neighbors, Inc.* v. *Washington Metropolitan Area Transit Comm'n*, No. 71-1244 (D. C. Cir. June 15, 1972), at 10 n. 5.

[121] *Metropolitan Coach Co.* (Order No. 155), 1915D P. U. R. 740, 741 (D. C. 1915).

[122] G. Turner, Trends and Topics in Utility Regulation, 379-81 (1969); H. Edgerton, *Value of Service as a Factor in Rate Making*, 32 Harv. L. Rev. 516, 520 (1919).

[123] *Riverside Grove Water Co., Inc., supra* note 102, 20 P. U. R. 3d at 120 (minimum system improvements required before increase would be allowed); *Parker, supra* note 102, 19 P. U. R. 3d at 403 (rates reduced to make them commensurate with poor quality of service; subject to restoration after 60 days if sufficient improvement is demonstrated); *Midwest Tel. Co., Inc., supra* note 102, 23 P. U. R. 3d at 31 (general rate increase authorized, withheld as to one area until service was made reasonably adequate, inspected and certified by engineers of department of commerce); *Northern Mo. Tel. Co., Inc., supra* note 102, 49 P. U. R. 3d at 317 (rate increase denied until re-

and courts have sustained them.[124] Sometimes the order has set new rates and simultaneously suspended them pending demonstration of satisfactory compliance with the condition;[125] at other times, the order, as those here, has withheld consideration of the request for increase until the condition has been met.[126] That the order assumes one or the other form is obviously without consequence insofar as its essential validity is concerned.

We perceive no legal barrier to an order by the Commission, securely founded upon an evidentiary record, preconditioning a fare raise upon terms calculated to safeguard the public interest in economical, efficient and adequate transportation.[127] The legislative imposition of

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habilitation of system and modern facilities were installed); *Cass County Tel. Co.*, 42 P. U. R. (n. s.) 48, 52 (Mo. Pub. Serv. Comm'n 1941) (rate increase withheld as to one area until system was restored and rehabilitated); *Consolidated Tel. Co.*, 18 P. U. R. 3d 152, 157 (Mo. Pub. Serv. Comm'n 1957) (50% of fare increase was authorized, remaining 50% increase withheld until service improvements were instituted); *Western Light & Tel. Co.*, *supra* note 102, 10 P. U. R. 3d 70, 76 (increase denied until company could show that substandard service has been improved); *Blair Tel. Co.*, *supra* note 102, 51 P. U. R. 3d at 262 (increase permitted only after old equipment was replaced with new); *Southern Nev. Tel. Co.*, 11 P. U. R. 3d 169, 173 (Nev. Pub. Util. Comm'n 1955) (increase allowed on services which had been modernized, an increase on the remainder was preconditioned on their modernization).

[124] *United Tel. Co.* v. *Mayo*, *supra* note 107, 215 So. 2d at 610-11. See also *State* v. *Morgan*, *supra* note 107, 277 N. C. 255, 177 S. E. 2d at 410; *Lakewood* v. *Lakewood Water Co.*, *supra* note 107, 148 A. 2d at 892.

[125] *Riverside Grove Water Co., Inc.*, *supra* note 102, 20 P. U. R. 3d at 120; *Midwest Tel. Co., Inc.*, *supra* note 102, 23 P. U. R. 3d at 262.

[126] *United Tel. Co.* v. *Mayo*, *supra* note 107, 215 So. 2d at 610-11; *Northern Mo. Tel. Co., Inc.*, *supra* note 102, 49 P. U. R. 3d at 317.

[127] Compare *Elyria Tel. Co.* v. *Public Util. Comm'n* 158 Ohio 441, 110 N. E. 2d 59 (1953); *General Tel. Co.* v. *Public Serv. Comm'n*, 341 Mich. 620, 67 N.W. 2d 882 (1954); *Florida Tel. Corp.* v. *Carter*, 70 So. 2d 508 (1954), cases which turn on statutory provisions which do not authorize the regulatory agencies in those states to consider the

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a grave responsibility ordinarily carries with it, as a matter of necessary implication, power to employ the means by which it may be discharged.[128] In this instance, the signatories to the Compact incorporated that thesis in an express grant of administrative authority.[129] By our measure, that authority—to take action "necessary or appropriate to carry out" the Compact's provisions[130]—is broad enough to enable the Commission to meet its regulatory responsibiilties in this case. As the Commission said:

> We construe the Compact as vesting us with the necessary tools to enable us to discharge our responsibility to the public and insure that it obtains from carriers subject to our jurisdiction economic, efficient and adequate service. Surely, Congress and the Compact signatories did not impose upon us a duty to consider and protect the public interest, on the one hand, and then fetter us with a statutory scheme so rigid and unyielding as to make impossible the responsible discharge of that duty, on the other hand.[131]

III. SUBSTANTIVE VALIDITY OF THE ORDERS

Sufficiency of the Evidence

The Commission found inefficiency in Transit's management, inadequacies in its service, and a relation of cause

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adequacy of service, or the economy and efficiency of management with *United Tel. Co.* v. *Mayo*, *supra* note 107, 215 So. 2d at 609, decided after Florida's statute was changed authorizing the Florida Public Service Commission to consider efficiency, sufficiency and adequacy of facilities provided and services rendered.

[128] *Federal Trade Comm'n* v. *Raladam Co.*, 283 U. S. 643, 649 (1931); *United States* v. *Denver & R. G. R. Co.*, 150 U. S. 1, 14-15 (1893); *In re Neagle*, 135 U. S. 1, 59 (1889).

[129] See text *supra* at note 114.

[130] See note 89, *supra*.

[131] *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 7.

and effect between the two.[132] These findings, as we have indicated, were based principally on data and analyses presented in the Loconto report and elucidated by Loconto as a witness at the hearings.[133] Transit asserts that the findings lack substantial support in the evidence considered as a whole[134] and, in that connection, that the Commission erred in crediting the evidence Loconto supplied. We deem these arguments unavailing.

Transit did not object to admission of Loconto's report in evidence, nor to his competence as a witness. It did not move to strike either the report or the testimony. For these reasons, the Commission, on Transit's application for reconsideration, felt that Transit's credibility objection came too late.[135] It nonetheless examined the reasons in support of Transit's arguments and concluded that they were "wholly inadequate."[136] Transit did not include among the numerous assignments of error in its application for reconsideration any other specification that the findings on management inefficiency and service inadequacy were not sufficiently supported by the evidence.

The Compact confers upon those affected by final Commission orders the privilege of requesting reconsideration.[137] The process is inaugurated by "an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration."[138] The Compact pro-

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[132]See text *supra* at notes 47-73.

[133]See text *supra* at notes 25-46.

[134]See, *e.g.*, *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 487-90 (1951).

[135]*D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 15.

[136]*Id.*

[137]Compact, *supra* note 1, tit. II, art. XII, § 16.

[138]Compact, *supra* note 1, tit. II, art. XII, § 16.

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vides, however, that "[n]o person shall in any court urge or rely on any ground not so set forth in such application." [139] We search Transit's application for reconsideration in vain for anything "stating specifically" an insufficiency of supporting evidence as a ground for disturbing the Commission's findings on the caliber of Transit's management and service.

The Compact requirement that errors charged on reconsideration be pinpointed is not an empty formality. It subserves the same considerations fostered by the companion rule that contentions to be urged on appellate review of judicial proceedings be properly raised and preserved in the trial court.[140] Not the least of those considerations is the opportunity, through precise identification of the errors alleged, for administrative reexamination and correction prior to judicial intervention in the regulatory process.[141] We have long admonished that points not subjected to agency scrutiny during administrative proceedings will not normally be entertained on judicial review.[142] That admonition, we have held, extends to claims that administrative findings are unsupported by substantial evidence.[143] Transit's insufficiency-of-evidence argument is properly before

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[139]Compact, *supra* note 1, tit. II, art. XII, § 16. In similar vein, that section further provides that "[n]o appeal shall lie from any order of the Commission until an application for reconsideration has been made and determined."

[140]See *Miller* v. *Avirom*, 127 U. S. App. D. C. 367, 369-70, 384 F. 2d 319, 321-22 (1967). See also cases cited *infra* note 141.

[141]*Quick* v. *Martin*, 131 U. S. App. D. C. 83, 86, 397 F. 2d 644, 646 (1968); *Brotherhood of Railway Trainmen* v. *Chicago, M. St. P. & P. R. R.*, 127 U. S. App. D. C. 58, 61-62, 380 F. 2d 605, 608-09, *cert. denied*, 389 U. S. 928 (1967); *Braniff Airways* v. *CAB*, 126 U. S. App. D. C. 399, 413, 379 F. 2d 453, 467 (1967).

[142]See cases cited *supra* note 141.

[143]*Democrat Printing Co.* v. *FCC*, 91 U. S. App. D. C. 72, 76-77 n. 10, 202 F. 2d 298, 302-03 n. 10 (1952).

us only on the challenge to Loconto,[144] to which we now turn.

No less in administrative than in judicial tribunals is it the factfinder's function to make the primary asessment as to the weight to be accorded particular items of evidence. Credibility determinations within the agency's sphere of expertise are peculiarly within its province, and courts will upset them only if made irrationally.[145] Our canvass of Transit's objections to Loconto's report and testimony gives us no cause to overrule the Commission on that score. We are mindful that there was evidence from which the Commission arguably might have concluded that Transit's operations are economically and efficiently conducted and its transportation service adequate, but "it is not a valid objection that conflicts of the evidence might conceivably have been resolved differently, or other inferences drawn from the same record."[146] We sustain the Commission's findings on this branch of the litigation.

Basis for Imposition of Precondition

Transit argues strenuously that the Commission erred in constructing its funding requirement as a condition precedent to further consideration of fare increases rather than as a condition to be met concurrently with the en-

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[144]Since no explanation is being offered as to why Transit's other contentions were not presented to the Commission on reconsideration, we do not reach the question whether the Compact requirement may yield in exceptional circumstances.

[145]See, *e.g. NLRB* v. *Walton Mfg. Co.* 369 U. S. 404, 408 (1962); *NLRB* v. *Geraldine Novelty Co.*, 173 F. 2d 14, 18 (2d Cir. 1949); *NLRB* v. *J. M. Machinery Corp.*, 410 F. 2d 587, 590 (5th Cir. 1969); *Dittmore-Freimuth Corp.* v. *United States*, 390 F. 2d 664, 685 (Ct. Cl. 1968).

[146]*Payne* v. *Washington Metropolitan Area Transit Comm'n* *supra* note 77, 134 U. S. App. D. C. 321, 334, 415 F. 2d 901, 914 (1968).

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joyment of higher fares. We do not agree. We have already satisfied ourselves that the Commission has power to impose preconditions as well as concurrent conditions in fare proceedings.[147] We are also satisfied that the Commission was well within its regulatory province, after diagnosing Transit's financial sickness,[148] in prescribing an effective rather than a doubtful cure.[149] Our function as a reviewing tribunal is limited to determining whether the remedy selected by the Commission is arbitrary or unreasonable.[150] The Commission's prescription easily survives that test.[151]

Order No. 1216 reflects the mature consideration the Commission gave the question whether a fare-increase order with concurrent conditions would sufficiently safeguard the public interest in economical, efficient and adequate transportation.[152] For four reasons, enlarged upon in its order on reconsideration, the Commission was persuaded that it would not.[153] The first was the Commission's conclusion, predicated on the results of the Loconto investigation, that "corporate decisions, not inadequate fare revenues, [were] the major factor in Transit's

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[147]See text *supra* at notes 113-131.

[148]See Part I, *supra*.

[149]See text *supra* at notes 113-131.

[150]*In re Standard Gas & Elec. Co.*, 151 F. 2d 326, 331 (3d Cir. 1945), *cert. denied*, 327 U. S. 796 (1946); *Nadiak* v. *CAB*, 305 F. 2d 588, 593 (5th Cir. 1962), *cert. denied*, 372 U. S. 913 (1963).

[151]Transit also attacks the Commission's orders for failure to make findings on certain subjects. The subjects referred to would be highly important in an undertaking to fix new fares, but they were irrelevant to the preconditions the Commission decreed. The orders established no new fares, and the Commission's findings support the action which the orders require.

[152]*D.C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 14-16.

[153]*D.C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 9-12.

present financial instability," with the consequence "that additional funds, not increased fares alone, were required to remedy this situation."[184] The second was the documented history of Transit's unwillingness over the years despite the Commission's urgings, to firm up its shaky financial structure,[185] a "history [which]forced us to con-

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[184]See text *supra* at note 60.

[185]The Commission summarized as follows:

In the first case which this Commission processed with regard to Transit's fares, we noted our concern "about the need for [Transit] to increase its equity in the business in order to insure the financial stability" of the carrier. [*D.C. Transit Sys., Inc.* (Order No. 245), 48 P.U.R.3d 385, 412 (1963)] In 1966, we reiterated this concern and again called upon Transit's management to remedy the situation [*D.C. Transit Sys., Inc.* (Order No. 563), 63 P.U.R.3d 32, 47 (1966)] [*D.C. Transit Sys., Inc.* (Order No. 564), 63 P.U.R.3d 45, 65-67 (1966)]. At that time, however, we were able to conclude from the record then before us that Transit's financial structure had not interfered with its responsibilities "for rendering good service to the public." [*Id.* at 65.] Even with that finding, however, we stated that "Transit's debt-equity ratio should not be allowed to deteriorate further." [*Id.* at 66.] Two years later, we had occasion to disapprove two management decisions which resulted in a siphoning of cash into two subsidiary corporations, and we noted that "in the management of its cash working capital, the company's guiding principle must be the maximum protection of its ability to meet its obligations under its franchise, the Compact, and Commission orders." [*D.C. Transit Sys., Inc.* (Order No. 773), 72 P.U.R.3d 113, 133 (1968)] In that same order, we concluded that management's decisions had not seriously affected the adequacy of the company's service, and we found reason to believe that the company had recognized its obligations to the public and would take action to meet those responsibilities in the future. [*Id.*] Even so, we urged Transit "to raise the cash need for transit operations through their non-operating properties, if no other sources are available." [*id.*] The next year, a similar exhortation was contained in our Order 984. [*D.C. Transit Sys., Inc.* (Order No. 984), 81 P.U.R.3d 417, 435 (1969)] Transit has thus been on notice of our concern for more than nine years during which, instead of taking steps to remedy the situation, it has deliberately allowed it to deteriorate.

D.C. Transit Sys., Inc. (Order No. 1219), *supra* note 6, at 9-10 n.9.

clude that Transit cannot be relied upon voluntarily to remedy its own financial ills."[156] Thirdly, with Transit's failures to comply with prior Commission orders, particularly "[the] outstanding bus purchase order [which] has directly affected the adequacy of the company's service,"[157] the Commission could find "no basis to believe that Transit would comply with concurrent conditions;"[158] instead, the Commission "determined that [its] precondition order was the only method by which we could assure the public that the company would deliver its part of the reciprocal obligations imposed upon it by the Compact."[159] Fourthly, the Commission cited its lack of power to insure compliance with a concurrent-condition order by requiring bond indemnifying the public[160] or by ordering reparations in the event of noncompliance[161] as additional factors supporting an order establishing preconditions.[162]

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[156] *D.C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 11.

[157] *Id. at* 11. In *D.C. Transit Sys., Inc.* (Order No. 245), *supra* note 120, 48 P.U.R. 3d at 406, 416 (1963), the Commission imposed upon Transit a plan requiring replacement of a varying percentage of its fleet with new, air-conditioned buses. Compliance since 1967, the Commission found, was "erratic," *D.C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 8, and no buses were purchased after 1968 although the requirement remained outstanding except for the period from October, 1969, to July, 1970. *Id.* The requirement was reestablished in *D.C. Transit Sys., Inc.* (Order No. 1052), *supra* note 51, 85 P.U.R.3d at 12, 28, but there was no compliance whatever by Transit thereafter.

[158] *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 11.

[159] *Id.*

[160] *Williams* v. *Washington Metropolitan Area Transit Comm'n*, *supra* note 88, 134 U. S. App. D. C. at 361 n.94, 415 F. 2d at 941 n.94.

[161] See *id.*

[162] *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 11.

These reasons, in our view, amply sustain the Commission's decision to address the problem by conditions precedent to a fare adjustment rather than conditions concurrent therewith. The Commission was called upon "to look into the future and determine whether, if rates were adjusted, the public could be reasonably assured that the company would correct the inefficient and uneconomic method of operation which we had identified and provide the adequate service which is the riders' due."[183] By the Commission's appraisal, "[t]he record clearly showed that a fare adjustment alone would not remedy the situation and that if our only order was an adjustment in fares, the result would be continued financial instability and a deterioration in the level and quality of transportation service afforded the public."[184] "Mere exhortation had not been productive," the Commission felt, and "drastic remedial action was required to bring the company's capital structure into balance to provide the stability necessary to achieve an efficient and economical transit operation."[185] We find no fault with the Commission's disposition of this aspect of the case.

To be sure, as Transit says, the Commission might have resorted to some other method of seeking compliance with the Compact's specifications respecting the quality of Transit's service. The Commission might, as Transit suggests, have ordered the capital changes it felt necessary and in the event of disobedience have gone to court to enjoin compliance.[186] It might have set the debt-equity ratio it deemed appropriate and then established fares hypothetically

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[183] *Id.* at 2.
[184] *Id.*
[185] *Id.*
[186] See Compact, *supra* note 1, tit. II, art. XII, § 18(a).

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on that basis;[167] or it might have granted a fare increase with an accompanying requirement that Transit hold the disputed increment in a special reserve pending fulfillment of its Compact duties.[168] Undoubtedly other techniques in the Commission's regulatory arsenal were available to ameliorate, in some degree at least, Transit's current fare plight consistently with an improved response to its service obligations.

These considerations, however, are largely beside the point. The relevant inquiries relate not to the availability of alternatives or the wisdom of shunning them, but solely to the legal propriety of the sanction the Commission selected.[169] The Compact, we repeat, empowers the Commission to take such action "as it may find necessary or appropriate to" achieve its objective.[170] The choice is initially the Commission's, and we may upset it only if it is unlawful or was capriciously derived.[171] Here the Commission concluded that concurrent conditions would not effectuate the Compact's goals in terms of Transit's service. It said:

> Mindful of the fact that our responsibility to protect the public interest is at least equal to our obligation to consider Transit's interests, we hold that while we

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[167]See E. Nichols and F. Welch, Ruling Principles of Utility Regulation, Rate of Return Supplement A 157 *et seq.* (1964); 1 A. Priest, Principles of Public Utility Regulation 215 (1969).

[168]Compare *Williams* v. *Washington Metropolitan Area Transit Comm'n*, *supra* note 88, 134 U. S. App. D. C. at 396, 415 F. 2d at 976; *Bobchick* v. *Public Util. Comm'n*, 115 U. S. App. D. C. 216, 232, 318 F. 2d 187, 203, *cert. denied*, 373 U. S. 913 (1963). But see *Democratic Cent. Comm.* v. *Washington Metropolitan Area Transit Comm'n*, 141 U. S. App. D. C. 79, 82 and n.10, 436 F. 2d 233, 236 and n.10 (1970).

[169]See text *supra* at note 150.

[170]See text *supra* at note 150.

[171]See text *supra* at note 150.

> may grant a fare increase, and condition that increase on a carrier's satisfaction of the steps we have found necessary to insure future performance of its statutory obligation to provide economical, efficient and adequate transportation, we are not compelled to do so if we conclude, as we have in this case, that such an order will not provide sufficient assurance that the public will be protected.[118]

Referring to the precondition specified in Order No. 1216, the Commission added:

> We were forced to conclude that if fares were adjusted *before* the company produced the required funds, we would have no basis for insuring that they, in fact, would be forthcoming. This, we held, would be calling upon the bus rider to pay a fare to an inefficiently and uneconomically operated transit company without any assurance that the company would remedy those defects and fulfill its obligation to the rider by providing, in the future, efficient, economical, and adequate transportation. We declined to impose such a one-sided and unjust burden on the bus-riding public.[119]

We discern no basis for reversing the Commission in this regard.

We are not confronted on this review with any question as to the validity of the Commission's precondition arising from the carrier's inability to meet it. Transit did not con-

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[118] *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 7-8 (footnote omitted).

[119] *Id.* at 2 (emphasis in original).

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test Locouto's recommendation of preconditions during the hearings, and although Transit's application for reconsideration alleged a multitude of errors, it nowhere claimed impossibility of compliance. The Commission took note of that circumstance,[176] as we take care to do now. Transit does state in its briefs, not that it cannot raise the $6.4 million which the precondition set, but that it cannot do so within a 90-day period[177] without liquidation or sale of assets at prices below fair market value,[178] but the statement assumes an erroneous premise. Order No. 1216 does not require performance within 90 days. It simply admonishes that performance more than 90 days removed might necessitate the making of a fresh administrative record to enable disposition of Transit's application for a fare increase.[177] Indeed, Order No. 1219 explicates that "[i]n the event Transit elects not to comply with our precondition during the 90-day period following issuance of our main order, it is nevertheless free to apply for a rate adjustment whenever it does so comply, and to then ask us to use whatever portion of the present record may remain sufficiently fresh as to permit proper disposition of its application."[178] We have every confidence that, once compliance is forthcoming, the Commission will maximise its use of the pres-

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[176] *Id.* at 14 n. 16.

[177] See text *infra* at notes 177-78.

[178] From this premise Transit argues that the precondition represents an effort to drive it out of business, a technique to which we have recently spoken. *Southeast Neighbors, Inc.* v. *Washington Metropolitan Area Transit Comm'n*, No. 71-1244, *supra* note 120, at 6-9. It suffices here to say simply that, as we now explain in text, Transit misreads the Commission's orders.

[177] *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 16.

[178] *D. C. Transit Sys., Inc* (Order No. 1219), *supra* note 6, at 14 n. 16.

ent administrative record, and will proceed expeditiously to a resolution of Transit's request for a fare increase.[179]

IV. CONSTITUTIONALITY OF THE COMMISSION'S ACTION

Asserting that at existing fares it will be operating at a substantial loss in the future, Transit lays claim, as a matter of constitutional right,[180] to fares increased to a point which would enable the company to earn a fair return. The Commission recognized a probable need for additional revenues to achieve that level,[181] but concluded that a demonstration of Transit's willingness and ability to provide, economically and efficiently, adequate transportation to the traveling public was a prerequisite to invocation of that doctrine.[182] We are thus brought to the

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[179]We could not in any event deal with a question of impossibility of compliance on this review. As we have observed, the Compact precludes us from entertaining issues not previously raised before the Commission by an application for reconsideration. See text *supra* at notes 137-144. Transit has never presented any such claim to the Commission. Even apart from the Compact, its nature plainly demands that it be given initial consideration by the Commission.

[180]It seems clear that the Commission, established by Congress for the District of Columbia and by two adjoining states, is subject to the prohibitions of both the Fifth and Fourteenth Amendments. The Commission so concluded, *D. C. Transit Sys., Inc* (Order No. 1219), *supra* note 6, at 12 n. 13, and so do we. However, these standards by which Transit's constitutional claim is to be measured are the same whether the Commission's action is tested by the one or the other. *Heiner* v. *Donnan*, 285 U. S. 312, 326 (1932); *Coolidge* v. *Long*, 282 U. S. 582, 596 (1931).

[181]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 7, 16; *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 2.

[182]*D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 15; *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 1, 2.

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question whether the orders under consideration can stand consistently with the requirements of due process of law.[183]

It is, of course, well settled that a governmentally-fixed rate confining a public utility's return from operations to an amount below the point of confiscation violates due process.[184] In Transit's past rate litigation, both the Commission[185] and this court[186] have been keenly sensitive

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[183]Invoking the well settled rule that he who alleges confiscation has the burden of proving it by clear and convincing evidence, *e.g.*, *Railroad Comm'n* v. *Pacific Gas & Elec. Co.*, 302 U. S. 389, 401 (1938), the Commission points out that Transit's financial and statistical statements reveal operation at a profit during March and April, 1972, and argues that Transit cannot benefit from the constitutional rule it invokes. Transit, on the other hand, claims operating losses during January and February, 1972, and projects losses even more substantial during the remainder of the year. Since the orders under review are in no wise dependent upon Transit's operating gains or losses for the time being, the financial facts which the parties aver were not made subjects of findings. But Transit's predictions of losses from operation at existing fares during the future annual period are not seriously questioned, and the Commission's orders consistently reflect the opinion that once Transit complies with the precondition imposed, a fare increase is a very likely probability. *D. C. Transit Sys., Inc.* (Order No. 1216), *supra* note 5, at 7, 16; *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 2. We cannot say that in these circumstances Transit has not shown the precariousness of its financial situation sufficiently to enable presentation of its due process challenge as an unavoidable issue in that case.

[184]*Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 475 (1938); *United Rys. & Elec. Co.* v. *West*, 280 U. S. 234, 249 (1930); *Blanton* v. *Belt Line Ry.*, 268 U. S. 413, 416-17 (1925); *Bluefield Water Works & Improvement Co.* v. *West Virginia Pub. Serv. Comm'n*, 262 U. S. 679, 690 (1923).

[185]*E.g.*, *D. C. Transit Sys., Inc.* (Order No. 1052), *supra* note 51, 85 P. U. R. 3d at 25; *D. C. Transit Sys., Inc.* (Order No. 984), 81 P. U. R. 3d 417, 438 (WMATC 1969).

[186]*E.g.*, *Democratic Cent. Comm.* v. *Washington Metropolitan Area Transit Comm'n*, *supra* note 168, 141 U. S. App. D. C. at 81-82, 436 F. 2d at 235-36. See also *D. C. Transit Sys., Inc.* v. *Washington Metropolitan Area Transit Comm'n*, *supra* note 88, 121 U. S. App. D. C. at 400, 350 F. 2d at 788.

to that principle. It is important to note, however, that the cases forging that limitation have dealt with situations wherein the quality of the utility's service to the public was not in issue.[187] The inquiry we are now summoned to make is whether an established inferiority in service makes for a difference in constitutional precept.

Our thoroughgoing research discloses that instances of denials or curtailments of rate increases because of poor service have been considered but infrequently problems reaching constitutional proportions. Where, however, the objection has been framed in terms of confiscation, quite uniformly it has been rejected.[188] A similar position is evident from the more numerous decisions leaving increases ineffective pending service improvements notwithstanding that the utility was left at or below the break-even point in the meantime.[189] In a real sense, then, these decisions incorporate the view, expressed or implicit, that the utility's fulfillment of its service commitments is a *sine qua non* to constitutional protection under confiscation principles. Like the Commission, we would be hard put "to assume that regulatory agencies, both in this jurisdiction and elsewhere, have engaged in unconstitutional proceedings for over a half

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[187] *E.g.*, *Bluefield Water Works & Improvement Co.* v. *Public Serv. Comm'n*, *supra* note 184.

[188] *Gay* v. *Damariscotta-Newcastle Water Co.*, 131 Me. 304, 162 A. 264, 265 (1932); *Hamilton* v. *Caribou Water, Light & Power Co.*, 121 Me. 422, 117 A. 582, 584 (1922); *New Jersey Cent. Traction Co.* v. *Board of Pub. Util. Comm'n*, 96 N.J.L. 90, 113 A. 692, 696 (1921). *Cf. United Tel. Co.* v. *Mayo*, *supra* note 107, 215 So.2d at 609. See generally, I. Barnes, Economics of Public Utility Regulation 601 (1942); D. Lilienthal, *Regulation of Public Utilities During the Depression*, 46 Harv. L. Rev. 745, 761 (1933).

[189] *New Jersey Cent. Traction Co.* v. *Board of Public Util. Comm'n*, *supra* note 188, 113 A. at 696; *Rockville Water & Aqueduct Co.*, *supra* note 102, 78 P.U.R.3d at 52; *Metropolitan Coach Co.*, *supra* note 121, 1915D P.U.R. at 741. *Cf. Hamilton* v. *Caribou Water, Light & Power Co.*, *supra* note 188, 117 A. at 583-84.

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century."[190] For reasons now to be explained, we believe that they have not.

It has long been recognized that the caliber of a utility's service need not remain a neutral factor in determinations as to its allowable return. The cases have consistently said that superior service commands a higher rate of return as a reward for management efficiency;[191] more importantly for present purposes, they have also maintained that inefficiency and inferior service deserve less return than normally would be forthcoming.[192] Much the same rationale undergirds the universal rule that expenditures incompatible with economical and efficient management are to be disallowed.[193] Eighty years ago, the Supreme Court, while acknowledging the unconstitutionality of unreasonable rates,[194] made these observations:

> It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made

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[190] *D.C. Transit Sys., Inc.* (Order No. 1219), *supra* note 5, at 13.

[191] *E.g., New England Tel. & Tel. Co.* v. *New Hampshire,* 104 N. H. 229, 183 A. 2d 237, 244 (1952); *LaSalle Tel. Co.* v. *Louisiana Pub. Serv. Comm'n,* 245 La. 99, 157 So. 2d 455, 458-59 (1963). See also *Market St. Ry.* v. *Railroad Comm'n,* 324 U. S. 548, 563 (1945).

[192] *Parker, supra* note 102, 19 P. U. R. 3d at 403; *Northern Mo. Tel. Co., Inc., supra* note 102, 49 P. U. R. 3d at 317; *Consolidated Tel. Co., supra* note 123, 18 P. U. R. 3d at 157; *Rochester,* 25 P. U. R. 3d 262, 278 (N. Y. Pub. Serv. Comm'n 1957); *Dakota Util. Co., supra* note 101, 1922C P. U. R. at 809. See also, *Market St. Ry.* v. *Railroad Comm'n, supra* note 191, 324 U. S. at 563; *Breaux Bridge Tel Co., supra* note 101, 41 P. U. R. 3d at 264.

[193] *E.g., Acker* v. *United States,* 298 U. S. 426, 430-31 (1936); *Trans World Airlines* v. *CAB,* 128 U. S. App. D. C. 126, 135, 385 F. 2d 648, 657 (1967), *cert. denied,* 390 U. S. 944 (1968); *Breaux Bridge Tel. Co., supra* note 101, 41 P. U. R. 3d at 262-63; *D. C. Transit Sys., Inc.* (Order No. 4480), *supra* note 101, 25 P. U. R. 3d at 377. See also text *infra* at notes 194-97.

[194] *Chicago & G. T. Ry.* v. *Wellman,* 143 U. S. 339, 344 (1892).

> up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call "operating expenses."[195]

So, in *Reagan* v. *Farmers Loan and Trust Company*,[196] the Court took pains to make clear that it was not

> laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that everyone should receive some compensation for the use of his money or

[195] *Id.* at 345-46.
[196] 154 U. S. 362 (1894).

> property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, . . .; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.[197]

And in *Smyth* v. *Ames*,[198] the Court put the point succintly:

> [W]hat the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.[199]

Not surprisingly, then, the Court, in *Bluefield Water Works and Improvement Company* v. *Public Service Commission*,[200] spoke of adequacy of return "under efficient and economical management."[201] Throughout the almost 50 years since *Bluefield* was decided, that standard has been gospel in the ratemaking field.[202]

We believe the constitutionality of governmental recognition of the interrelationship between fair return and quality service can hardly be doubted today. "Certainly," as the Supreme Court has said, "the due process clause of

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[197] *Id.* at 412.
[198] 169 U. S. 466 (1898).
[199] *Id.* at 547.
[200] *Supra* note 184.
[201] *Id.* at 693.
[202] See cases cited *supra* notes 101-02.

the Constitution is not violated when a Commission takes into consideration practical results to the public of advances which is has allowed in rates."[203] The context of that declaration was a rate proceeding which had culminated in a reduction of street railway fares from seven cents to six cents.[204] The seven-cent fare had been achieved by an experimental increase from a previously existing five-cent charge for the same transportation.[205] The regulatory agency had found that the six-cent rate afforded a reasonable return on the carrier's rate base and that it was "all or more than the reasonable value of the services being rendered to patrons."[206] The Court pointed out that "[t]he consideration of service as a justification for rates" had arisen "upon a comparison of the service of the Company under the five-cent rate and under the seven-cent rate,"[207] and that

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[203] *Market St. Ry.* v. *Railroad Comm'n, supra* note 191, 324 U. S. at 563. The reference is to the Due Process Clause of the Fourteenth Amendment. *Id.* at 553.

[204] *Id.* at 555.

[205] *Id.*

[206] *Id.* at 557. As described by the Court, the agency had found "that the service had constantly deteriorated and was worse under the seven-cent fare than under the former five-cent fare," and that "some of the causes were beyond the Company's control" but that "after allowance for these causes" there was "evidence of long-time neglect, mismanagement, and indifference to urgent public needs." *Id.* Deficiencies in service were "failure to operate on schedule, long intervals between cars, followed by several cars operating with little headway, overloading, inadequate inspection, and inadequately maintained rolling stock;" vehicles obsolete, and many out of service; a manpower shortage and an "entire system . . . suffering from deferred maintenance. . . ." *Id.* The agency's position was that allowances for depreciation should be devoted to replacement of depreciated property and not, as the carrier felt, to the discharge of debts. *Id.*

[207] *Id.* at 563. The Court deemed it unnecessary to consider the question whether rates not yielding a fair return can be justified by inferior service. *Id.* at 562. The Court found that the six-cent fare was not confiscatory and that, as shown by the accompanying quotation in text, the agency "did not make an independent valuation of the service to patrons and fix rates accordingly." *Id.*

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the agency had "found that the 40 per cent increase of rate had been accompanied by a deterioration of service."[208] The Court also pointed out that "[s]ome factors in the bad service were beyond the Company's control" but that "others were found not to be without remedy by good management."[209] "That higher rates failed to improve, failed even to maintain, service" said the Court, "certainly removed one of the justifications for the increase which the Company was enjoying."[210] "So far as the public was concerned," the Court added, "the experiment with the seven-cent rate yielded them no better immediate service and, because of the Company's policies, gave them no prospect of more permanent service."[211] The Court held that "[t]o the extent that the [agency] was influenced by considerations of the value of service in this case, we find nothing that denies the Company any rights possessed under the Federal Constitution.[212]

That holding, in our view, solidly supports the thesis that the caliber of a utility's service may constitutionally qualify as a prominent and even decisive factor in the regulation of its rates. We do not suggest that the case discussed and the one at bar are close parallels,[213] nor do

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[208] *Id.* at 563.

[209] *Id.* See also note 206, *supra.*

[210] *Id.*

[211] *Id.*

[212] *Id.* at 563-64.

[213] The six-cent fare in *Market Street* was found to be nonconfiscatory, but the argument here is that the existing 40-cent fare is confiscatory. The former seven-cent fare in *Market Street* was experimental and it not only brought no increase in revenue but so discouraged patronage that continuation of service was threatened. *Id.* at 555-56, 563. No one seems in position to make those claims here. Moreover, the question here is not whether a fare can be reduced on account of poor service, but whether poor service can constitutionally justify postponement of consideration of an increase until the service is improved.

we intimate a view as to whether, irrespective of other considerations, rates may lawfully be scaled in proportion to the public worth of the utility's service.[214] We do think, however, that the likely effect of a sought-after rate increase upon the quality of the service is one of the "practical results to the public"[215] to which due process indulges reasonable regulatory consideration.

The precise constitutional issue before us is whether the Commission exceeded the limits of due process when it made a fare raise contingent upon steps calculated to rectify serious deficiencies in the service Transit furnishes the busriding public. Transit's argument has one central theme: its revenues cannot be permitted to fall below the level of fair return, and surely not below the break-even point, no matter what the circumstances, and even if its management is uneconomical and inefficient and its service inadequate. If Transit is correct, the Commission is powerless to sanction corrective measures by deferring further consideration of a fare increase. If Transit is correct, it may disregard its public responsibilities at will —as the Commission found that it has frequently done—[216] and yet insist that the public respond to its demands for higher fares. We cannot accept that position. We do not believe the Constitution left the Commission impotent to deal with the situation confronting it in a sensible manner.

The Due Process Clause strikes a balance between competing governmental and private interests at the point of reasonableness. Action rationally subserving a substantial governmental concern draws condemnation on due

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[214]See notes 207, 213, *supra*.

[215]See text *supra* at note 203.

[216]See text *supra* at notes 50-58 and note 155, *supra*.

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process grounds only if it is arbitrary or unreasonable.[217] The importance of the interests of three cooperating sovereigns in the quality of Transit's operations and service is manifest.[218] On the record before us, it must be concluded that Transit has not met its public responsibilities in those areas.[219] It must be accepted, too, that Transit can measure up if only it will,[220] and that preconditioning further consideration of a fare increase upon remedial steps by Transit is the only method of assuring that the public interest will be protected.[221] We cannot say that, in the circumstances here, the Commission's action in pursuing that course is either arbitrary or unreasonable.[222] By the same token, we do not perceive any due process violation occasioned by the Commission's orders. As the Commission said:

> If, indeed, the company temporarily sustains a loss while it complies with our precondition order, it will not be because we have ordered it to do so, but because the effects of the company's past decisions have now impacted so seriously upon its statutory obligation to provide the public with efficient, economical and adequate transportation service as to require us to direct remedial measures as a precondition to any fare adjustment. The Constitution does not guarantee a public utility immunity from

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[217] *E.g., Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 391 (1937); *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934); *Burnet* v. *Wells*, 289 U. S. 670, 679 (1933).

[218] See text *supra* at notes 50-58.

[219] See text *supra* at notes 132-46.

[220] See text *supra* at notes 174-79.

[221] See text *supra* at notes 64-73, 157-65.

[222] See text *supra* at note 217.

loss occasioned by uneconomic and inefficient management decisions, and we do not believe that it bars a regulatory agency on a record such as this from taking adequate steps to protect the public interest even if the short term effect of such an order is a temporary loss to the company. We made clear in our main order, and we take this occasion to reiterate, that as soon as Transit indicates its willingness to fulfill its statutory obligations to the public, we stand ready to insure that the public fulfills its reciprocal obligations to Transit.[223]

In our view, the Constitution does not require more. In the aspects discussed herein, the orders under review are *Affirmed.*

MACKINNON, *Circuit Judge*, concurring specially: While I concur in the result here, I believe that the Commission, and to a certain extent our opinion, overstates the deficiencies of D.C. Transit. The overall situation has degenerated to the point where many blame Transit completely for the financial ills that have befallen it. Transit, in response, blames the Commission, encouraged by a vocal and irresponsible segment of the public, for refusing to provide the revenue needed for survival. To my view the responsibility for Transit's condition must be widely shared—there is merit to the contentions of all parties.

It is indeed true that Transit is presently in poor financial condition; and certainly the Commission, acting on behalf of the public interest it is bound to serve, is justified in seeking a capital structure for Transit that will reduce

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[223] *D. C. Transit Sys., Inc.* (Order No. 1219), *supra* note 6, at 13-14.

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debt service expense and improve the overall financial stability of the company. But *ordering* Transit, in its ailing condition, to attract such large sums of new money may be analogous to a doctor ordering a patient who has just suffered a severe heart attack to get up and run a marathon. It may be possible to acquire new capital—I hope it is. But if Transit actually is as deficient in its operations as the Commission now contends, it may not be possible—investors are not generally attracted to poorly operated or failing ventures. I can join in the opinion of the majority affirming the Commission's decision here only because there is no basis *on this record* for concluding that it would be impossible for Transit to comply with the conditions imposed by the Commission.

It seems to me that the Commission could have been more helpful to Transit in attracting additional capital if it had determined the new fare (the Commission admits a fare increase is justifiable) and simultaneously suspended that fare pending satisfactory compliance with the conditions imposed here. *Midwest Tel. Co.*, 23 P. U. R. 3d 26, 31 (Ind. Pub. Serv. Comm'n 1958); *Riverside Grove Water Co.*, 20 P. U. R. 3d 117, 120 (Calif. Pub. Util. Comm'n 1957). That course of action would have provided potential investors assurance of a fare increase of pre-determined magnitude rather than having the question left to the vagaries of future Commission action. As Vice-Chairman Sullivan noted in his dissent to the Commission's order, that order leaves the Company—and potential investors—"dangling" in mid-air. This is hardly an attractive situation for attempting to raise substantial amounts of new capital.

Finally, I believe that the Commission's disposition of this matter is only temporarily valid because of the uncertainties left open by the present, inadequate, record. I do

not consider that the Commission has fully faced the entire problem. It must eventually face up to the present need for more operating revenue, and it must eventually confront the issue of whether the conditions imposed by its order are possible of accomplishment or unreasonable by virtue of being impossible to meet. But these issues must be fully litigated before the Commission before they may be considered by us. While I thus believe that certain of the Commission's requirements appear to be somewhat unreasonable, there must be a fully developed record from the Commission before we could properly so find. Subject to these reservations I concur in the result reached by the majority opinion here.

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WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1216

IN THE MATTER OF:

Application of D. C. Transit System, Inc., for Authority to Increase Fares.

Served May 19, 1972
Application No. 752
Docket No. 241

APPEARANCES:

HARVEY M. SPEAR, FRANCIS E. LAKE, JR., and JAMES MOLLICA, appearing on behalf of D. C. Transit System, Inc., applicant.

ELIZABETH B. KLEEMAN, MICHAEL WILLIAMS, and JOHN J. DUFFY, appearing on behalf of the Black United Front, protestant.

DIANA K. POWELL, appearing on behalf of herself as protestant.

DOROTHY CAMER, appearing on behalf of herself as protestant.

LEONARD N. BEBCHICK and STANLEY SHER, appearing on behalf of Leonard N. Bebchick and Daniel W. Gottleib, intervenors.

MALAKU J. STEEN, appearing on behalf of himself as intervenor.

EDWARD B. WEBB, JR., appearing on behalf of the District of Columbia Council, intervenor.

EDMOND L. KANWIT, appearing on behalf of Retired Professional Action Group, intervenor.

JOHN J. BOSLEY and MADELEINE B. SCHALLER, appearing on behalf of Metropolitan Washington Council of Governments, intervenor.

ROBERT N. BROWN, appearing on behalf of Senior Citizens Clearinghouse Committee of the District of Columbia and the Greater Washington, D. C. Area Council of Senior Citizens, intervenor.

MARTIN H. FREEMAN, appearing as Peoples' Counsel of the State of Maryland, intervenor.

BERNARD DOBRANSKI, General Counsel and STEPHEN L. SHARFMAN Assistant General Counsel, Washington Metropolitan Area Transit Commission.

Before JEREMIAH C. WATERMAN, Chairman, ROBERT L. SULLIVAN, Vice Chairman, PRESTON C. SHANNON, Commissioner.

I

PROCEDURAL BACKGROUND

On December 28, 1971, D. C. Transit System, Inc. (Transit) filed revisions to its Washington Metropolitan Area Transit Commission Tariffs No. 41 and No. 45 to be effective January 27, 1972. Transit's revised tariff filings, which were accompanied by supporting information as required by Commission Regulation 56-01(c), were designated Application No. 752. The revised tariffs proposed alternative increases for regular route operations in the District of Columbia and suburban Maryland, and a change in the R. F. K. Stadium fare. In its first alternate, Tariff No. 41R, Transit proposed the following change in its rate structure:

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1. District of Columbia Regular Service:

   Cash fare of 50¢ for regular route service within the District of Columbia (presently 40¢).
   Five tokens for $2.25 for regular route service within the District of Columbia (presently 5 for $2.00).

   Free Transfers.

2. D. C. Capitol Hill Express Service:

   90¢ cash fare or 40¢ cash fare and one token, or 40¢ cash fare and a valid D. C. Transit Transfer (presently 75¢).

   Free Transfers.

3. Maryland-District of Columbia Interstate Local Service:

   Cash fare of 70¢ (or 20¢ cash fare and one token, or 20¢ cash fare and a valid D. C. Transit Transfer) for regular route service within the District of Columbia and one zone of carriage in Maryland or any part thereof (presently 55¢). 10¢ additional cash fare for each of the second, third, and fourth zones of carriage in Maryland or any part thereof and 5¢ additional cash fare for each succeeding zone of carriage in Maryland, or any part thereof (same as present).

   Free Transfers.

4. Maryland-District of Columbia Interstate Express Service:

   Cash fare of 75¢ (or 25¢ cash fare and one token, or 25¢ cash fare and a valid D. C. Transit Trans-

fer) between the District of Columbia and the first bus stop in Maryland (presently 60¢). 10¢ additional cash fare for each of the first four zones of carriage in Maryland or any part thereof and 5¢ additional cash fare for each succeeding zone of carriage in Maryland or any part thereof (same as present).

Free Transfers.

5. Maryland Intrastate Service:

Cash fare of 55¢ (or 5¢ cash fare and one token) for the first two zones of carriage or any part thereof (presently 40¢). 15¢ additional cash fare for the third zone of carriage, or any part thereof and 5¢ additional cash fare for each succeeding zone of carriage or any part thereof (same as present).

Free Transfers.

6. Virginia Interstate Zone (Route C-1—Langley):

Cash fare of 20¢ (presently 15¢).

In its second alternate, Tariff No. 41AR, Transit proposed the following change in its rate structure:

1. District of Columbia Regular Service:

Cash fare of 45¢ for regular route service within the District of Columbia (presently 40¢).
Five Tokens for $2.25 for regular route service within the District of Columbia (presently 5 for $2.00).

5¢ Transfers (except free to school children using valid D. C. School Ticket) (presently free transfers).

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2. D. C. Capitol Hill Express Service:

90¢ cash fare, or 45¢ cash fare and one token, or 45¢ cash fare and a valid D. C. Transit transfer (presently 75¢).

5¢ Transfers (presently free transfers).

3. Maryland-District of Columbia Interstate Local Service:

Cash fare of 70¢ (or 25¢ cash fare and one token, or 25¢ cash fare and a valid D. C. Transit Transfer) for regular route service within the District of Columbia and one zone of carriage in Maryland or any part thereof (presently 55¢). 10¢ additional cash fare for each of the second, third, and fourth zones of carriage in Maryland or any part thereof and 5¢ additional cash fare for each succeeding zone in Maryland or any part thereof (same as present).

5¢ Transfers (presently free transfers).

4. Maryland-District of Columbia Interstate Express Service:

Cash fare of 75¢ (or 30¢ cash fare and one token or 30¢ cash fare and a valid D. C. Transit Transfer) between the District of Columbia and the first bus stop in Maryland (presently 60¢). 10¢ additional cash fare for each of the first four zones of carriage in Maryland or any part thereof and 5¢ additional cash fare for each succeeding zone of carriage in Maryland or any part thereof (same as present).

5¢ Transfers (presently free transfers).

5. Maryland Intrastate Service:

   Cash fare of 50¢ (or 5¢ cash fare and one token) for the first two zones of carriage or any part thereof (presently 40¢). 15¢ additional cash fare for third zone of carriage or any part thereof and 5¢ additional cash fare for each succeeding zone of carriage or any part thereof (same as present).

   5¢ Transfers (presently free transfers).

6. Virginia Interstate Zone (Route C-1—Langley):

   Cash fare of 20¢ (presently 15¢).

Additionally Transit, in the revised pages of WMATC Tariff No. 45, proposed a $2.00 round trip fare for service to R. F. K. Stadium (presently $1.00 for a one-way trip and $15.00 for a 20-ride ticket).

Accompanying the application for a fare increase was a Transit motion requesting an interim increase in the fares pending full determination by the Commission of its application. Transit also requested an immediate hearing on its motion for interim relief.

On January 11, 1972, in Order No. 1191, we denied Transit's motion and its request for an immediate hearing thereon on the ground that the public interest would not be served by the granting of an interim fare increase pending full determination of the application filed by Transit for general increases.

In Order No. 1193, served January 21, 1972, we set hearings on the matter to begin February 17, 1972. We also requested Transit to supply us with the necessary documentation showing compliance of the proposed in-

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creases with Price Commission regulations. In addition, we ordered Transit to engage a consultant to prepare a study of its Maryland fare zone structure. Finally, we denied the motion of the Black United Front to stay hearings or any other proceedings related to this application.

On January 26, 1972, Order No. 1194 suspended Transit's proposed tariff through April 26, 1972.

In Order No. 1200, served February 14, 1972, we denied the request of Protestant Camer for the postponement of the February 17 hearing. Order No. 1201, issued February 16, 1972, denied the Black United Front's petition for reconsideration of Order No. 1193, its motion to reopen the proceedings in Docket No. 216, and its request for additional relief contained in its December 30, 1971, motion for stay of hearings.

Notice of the proposed fares and hearings thereon was given in accordance with Commission rules and regulations. Twenty-four days of formal hearings were held, concluding on May 12, 1972. The transcript of testimony and argument in this proceeding totals 4,483 pages. Ten protestants and intervenors were admitted to the proceedings: the Black United Front; Diana K. Powell, pro se; Dorothy Camer, pro se; Leonard N. Bebchick and Daniel W. Gottlieb, pro semitsos; Malaku J. Steen, pro se; District of Columbia Council; the Retired Professional Action Group; Metropolitan Washington Council of Governments; Senior Citizens Clearinghouse Committee of the District of Columbia and the Greater Washington, D. C. Area Council of Senior Citizens; and the Peoples' Counsel of the State of Maryland.

In addition, two hearings were held to afford interested persons other than formal parties an opportunity to ex-

press their views to the Commission.[1] Twenty-nine persons made statements for themselves or on behalf of organizations at these hearings.

On April 25, 1972, we issued Order No. 1213 further suspending the tariffs until May 26, 1972.

On April 27, 1972, Order No. 1214 was issued denying the petition of Julius W. Hobson to intervene in this proceeding and on May 3, 1972, Order No. 1215 denied his application for reconsideration of Order No. 1214. Chairman Waterman did not participate in either order.

II

A preliminary analysis of the financial data submitted in this record indicates the need for some additional revenue. In determining whether and in what degree the fare should be adjusted to meet that need, we are guided by pertinent provisions of the Compact and interpretations of those provisions by the U. S. Court of Appeals. We have particular reference to the provisions Title II, Article XII, Section 6 of the Compact and the opinion in *D. C. Transit* v. *WMATC*, 350 F. 2d 753 (CADC, 1965).

Section 6a(3) provides:

> "In the exercise of its power to prescribe just and reasonable fares and regulations and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by

[1] These hearings were originally scheduled on Tuesday evening, April 25, 1972, in the District of Columbia and Friday evening, April 28, 1972, in Maryland. We were forced, however, to cancel the Tuesday evening hearing. The hearing was rescheduled and held on Saturday morning, April 29, 1972.

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the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service."

In the 1965 case cited the Court said:

"A 'just and reasonable' rate is one that assures that all the enterprise's legitimate expenses will be met, and that enables it to cover interest on its debt, pay dividends sufficient to continue to attract investors, and retain a sufficient surplus to permit it to finance downpayments on new equipment and generally to provide both the form and substance of financial strength and stability." 350 F. 2d 778

The Court also said in that opinion that, "The Commission is thus required to see to it that the fare-payers pay no more than is necessary to ensure the continued adequacy of the company's service and provide a return to the shareholders that is reasonable under the circumstances." 350 F. 2d 780

Our attempts to determine a fare which would satisfy these guidelines on the basis of the record before us has produced only frustration. For any fare that would cover reasonable expenses and provide a reasonable return would clearly not provide either the form or the substance of financial stability. Nor could we assure, simply by adjusting the fare, the continued adequacy of the company's service. Experience, particularly since the last fare increase of July 1970, and the facts of record submitted in this case, demonstrate that even if the fare were to be increased in

the full amount requested by D. C. Transit, little if any improvement would be expected in what has been shown to be the very unstable financial condition of this company.

Since Order No. 245, issued in April 1963, there has been in force a Commission-imposed bus purchase plan whereby Transit has been required to replace a varying percentage of its bus fleet each year with new, air-conditioned buses. Since 1967, compliance has been erratic. No buses have been purchased since 1968 even though the requirement has been outstanding during that entire period except for a short period from October 1969 to July 1970.

In 1970, when the basic District of Columbia fare was increased from 32 cents to 40 cents, a 25 percent increase, the bus purchase requirement was reestablished. At that time, in order to provide assurances that those buses would in fact be purchased, we ordered Transit to establish a bus-purchase escrow account to be funded over a period of six months beginning in September 1970. The total amount to be escrowed was $620,000, which represented 20 percent of the total purchase price of 85 buses, an amount which we considered to be an adequate downpayment. (See Order No. 1052, June 26, 1970).[2] Transit never purchased those buses, and stands today, nearly two years later, in violation of that order. Its justification, submitted formally to us in December 1971, was that no one would extend credit for the purchase of 85 buses. Transit was able to acquire some financing for the buses from local banks but only on conditions requiring a downpayment approaching 50 percent. This meant that the number of buses Transit could finance with the $620,000 downpayment was only 35 instead of the 85 required by the bus purchase program.

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[2] According to records on file with the Commission, D. C. Transit System, Inc. purchased 696 buses since 1961, 58 percent with no downpayment, 12 percent with 4 percent downpayment, and 30 percent with 10 percent downpayment.

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As we stated in Order No. 1188, issued December 16, 1971, the fact that D. C. Transit was unable to secure financing to purchase additional rolling stock led us into a fuller inquiry as to the underlying causes and the full implications of the financial situation confronting Transit. We undertook a formal investigation of the company's inability to finance additional rolling stock, and hired a consulting firm, Touche Ross & Co., to perform a financial analysis of Transit and to make recommendations as to the steps which might be required to give Transit necessary financial stability. On March 31, 1972, the consultant submitted a report prepared by one of its partners, Pasquale A. Loconto. That report was submitted in the record of this case as Staff Exhibit No. 17. Mr. Loconto appeared and stood cross examination on the recommendations and conclusions in his report.

The report examined the financial history of the company, analyzed its capital structure, analyzed its debt structure, reached certain conclusions respecting the need to improve the financial condition of the company, and recommended the manner and the means for doing so.

By way of historical background, the report points out that current liabilities of the company have increased since 1957 by $10.5 million to a current level of $14.7 million. Long-term payables are up from $5.4 million to $18.6 million. Reserves and other liabilities declined from $12.1 million in 1957 to $3 million in 1970. Stockholders' equity consists of (1) $500,000 representing capital stock which amount has remained constant throughout the period, and (2) retained earnings which have decreased from a high of $3.8 million in 1964 to $1.5 million in 1971.

The report also examines operating trends. Operating revenues have increased each year for a total increase of

$22.5 million since the company began operation. Operating revenue deductions have also increased, that total increase being $23.3 million. Operating income during the period has ranged from a high of $2.3 million in one year to a low of a $48,000 loss in another. Interest expense has increased from $384,000 in 1957 to $1.4 million in 1970. The increasing interest expense has been a major contributing factor in Transit's poor profit picture.

The Loconto report also offers an analysis through financial ratio trends, which ratios he believed were meaningful in an analysis of the financial condition of the company. Current ratio was used as a measure of the liquidity of the company, or its ability to meet its current obligations. Current ratio of D. C. Transit has dropped from 1.5 in 1957 to .2 in 1970. Loconto asserted that this "indicates an extreme lack of liquidity and little provision for unevenness in the flow of funds available to meet current liabilities. If that flow should decline, even temporarily, a condition of insolvency could conceivably result." (Staff Exhibit No. 17, p. 9) Another comparison he used was the comparison of total debt to stockholders' equity. This illustrates the relationship between the creditors' and the owner's investments in the assets of the company. This ratio has increased from 5.9 in 1961 to 18.1 in 1970. That degree of creditor interest in the assets of the company indicates, according to the report, a high degree of risk. Another test, interest coverage, was used to illustrate the ability of the company to meet interest payments with income from operations. In 1957, funds generated were 4.2 times the rate of interest expense; in 1970 this had decreased to .7 times. From the point of view of a potential lender, this level was considered by Loconto to be very low. Finally, the comparison was made between funds

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generated by operations, after interest and taxes, to long-term debt not currently due and payable. This ratio has declined in Transit due largely to the increase in long-term debt. It has ranged from a high of 60.2 percent in 1961 to a low of 3.7 percent in 1968 and was 14.9 percent in 1970. "This means," said Loconto, "that at the current level of funds generated, it would take more than seven years to retire all the existing debt if all available funds were applied to this purpose." (Staff Exhibit No. 17, p. 10) Another meaningful test presented was stockholders' equity as a percent of total assets. This ratio has decreased from a high of 14.4 percent in 1961 to 5.2 percent in 1970. This, again, was considered quite low. Other ratios and tests made by Loconto similarly indicated a worsening financial picture for D. C. Transit. As the report stated, "The combination of trends presented above indicates that the financial condition of the company has been steadily declining during recent years." (Staff Exhibit No. 17, p. 11)

Next, the report presented a capital structure analysis. A particularly pertinent aspect of this analysis, in our opinion, was the comparison of financial indicators for D. C. Transit with those indicators for ten other privately owned transit companies. With respect first to current ratio, the average of the comparison companies was 1.4, the lowest of the comparison companies being .5. D. C. Transit is .2, showing a much lower liquidity and smaller reserve for uneven flows of funds to meet current liabilities than any of the other companies. With respect to total debt to stockholders' equity, the highest of the comparison companies was 1.6 to 1; Transit is 18.1 to 1, eleven times higher than the highest of the comparison companies. Stockholders' equity as a percent of total assets indicated a much

greater reliance on financing from sources other than the owners of D. C. Transit than in the comparison companies. The comparison of property, plant, and equipment to long-term debt and stockholders' equity indicated a heavier reliance on short-term financing to fund long-term assets, an undesirable and unsound practice. Loconto's conclusion was that, "It is clear that the structure of the company is quite different from other companies in the industry. By all means, the differences are toward a structure which is more risky and less financially sound." (Staff Exhibit No. 17, p. 21)

The report also noted that other assets, primarily non-operating, make up a relatively large part of the assets. These assets generally provide relatively little return to the company. (Staff Exhibit No. 17, p. 22)

The Loconto analysis of debt disclosed that debt increased steadily until 1965, and since then has remained between $23 million and $26 million. The overall cost of debt is at 6.82 percent on the average. Debt servicing requirements have increased with the increase in debt. Since 1957 the debt servicing requirements have grown from under $1.3 million to $6.7 million annually. Operations have not produced sufficient funds to meet the debt servicing requirements since 1965, and the result has been that the company has been forced to meet the debt service requirements by refinancing debt rather than paying it off. This refinancing practice, in turn, creates what Loconto called a "high risk" situation because there is the chance that the creditors will be unwilling to refinance the debt, will call it instead, and there will not be funds available to pay it. The report also criticized the mix of short and long-term debt. This shows that the company is financing long-term assets

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with short-term and intermediate-term financing, a poor business practice.

Having performed his analysis of capital structure and debt structure, Loconto concluded that the Commission and the company are presented with four basic problems going to the question of financial stability. First, he said some correction must be made in the fact of excessive short-term debt in relation to long-term debt. Also requiring correction was the problem of the excessive debt in relation to stockholders' equity. Since debt service demands are fixed and must be met, while there is discretion in whether stockholders will receive return when earnings are insufficient, the debt-equity ratio should be reduced. The third area of concern was the fact of the excessive non-earning assets. The consultant noted that the earnings of these assets, largely subsidiary real estate corporations, were very small in relation to their value. He also noted that there are on the books of those subsidiaries $3.1 million in accounts receivable in the form of loans to affiliates and former affiliates. These loans apparently are non-interest bearing. Thus, there appear to be assets in the form of receivables of the subsidiary corporations which could be recalled and made available to the parent operating company.

The fourth problem is the inadequacy of funds provided by operations. This problem obviously can only be cured by increased farebox revenues or subsidization of farebox revenues from the taxpayer. However, the consultant points out that even a considerable increase in net income from this source would not be adequate to make principal payments due within the coming year, which are in excess of $5 million.

Finally, Loconto made a number of specific recommendations for application of funds to improve Transit's financial

condition. He recommended a reduction of current liabilities in an amount of $5 million during the first future annual period and an eventual reduction of current liabilities by $11 million to achieve a current ratio of 1.0. He next recommended reduction of long-term debt. It would require $8 million to reduce long-term debt to $10 million and he recommended a debt reduction of $4 million during the future annual period to contribute toward that goal. Finally, he recommended an amount of $3 million for the purchase of new buses in compliance with our bus purchase program.

As to potential sources for the needed funds he suggested that the $3 million in loans from subsidiaries to affiliates and former affiliates could be called to make that amount available for the operating company. He also indicated possible sale of properties classified as operating properties but not used in operations, which would produce another $3.6 million. He further suggested that an increase of paid-in capital might well be justified because the initial capitalization was "exceedingly small" and dividends of $4.4 million were paid out despite the fact that Transit had a low level of stockholders' equity.

None of the facts presented in the Loconto report was disputed by the company, nor was there any attempt made to rebut his testimony. Indeed, counsel for Transit asserted that the company had taken the report seriously and had undertaken preliminary steps for the sale of some properties which would provide at least some of the needed cash.

Thus, the record before us shows clearly and in great detail Transit's seriously unstable and risky financial condition.

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What will happen if we increase the fare while these conditions prevail? The company argues that we have an obligation to increase the fare on the showing that expenses exceed revenues. That, they assert, is a necessary ingredient in the fight to restore financial stability. It is true that part of the financial problem of the company is that in some years revenues forecast in our rate orders have not fully materialized. It is difficult to know whether that was due to our inability properly to forecast, or to a failure of the company to prove its need through presentation of convincing data, or to unforeseen circumstances. Perhaps all of those things contributed. In any event, we must, in determining whether a fare is just and reasonable, look to the future.

What we see in the future if we increase the fare and do nothing more, is continued instability and a deterioration in the level and quality of service offered. In these circumstances, raising the fare would be asking the ratepayer to meet his obligation to the company without requiring the company to meet its obligation to the ratepayer. We do not perceive the Compact or the Constitution as imposing a unilateral obligation on the ratepayer. Rather, we believe that the ratepayer and the company have a reciprocal obligation. We believe that obligation requires that the company give evidence that it can perform the services expected of it so that the ratepayer, in return for his contribution, will receive full value in the form of full services.

The language of Section 6a(3) is explicit. It requires that in setting a just and reasonable fare we must give due consideration "to the need of revenues sufficient to enable such carriers, under honest, economical and efficient management, to provide [adequate and efficient transpor-

tation] service." The record here shows that the present capital structure and debt structure of Transit do not reflect economic and efficient management. Non-operating assets have not been employed as advantageously to the parent operating company as prudent management practice would dictate. Under its current capital and debt structures, Transit is unable to provide and replenish the basic tools of its trade, its rolling stock. Its chronic cash-short condition results in too few drivers, too few mechanics, too few bus cleaners, and too high an incidence of failure to provide basic service. We consider that less than efficient management. The unnecessarily high debt service requirement is uneconomic. Operating on the brink of insolvency is surely not efficient and economic.

Therefore, we believe that the overriding and threshold question that we face in this case is, can financial stability be restored to this company so that we may establish a rate which is "just and reasonable" to all concerned? We believe that the answer lies in the willingness of the company to alter the capital and debt structures of the company in the manner suggested by the Loconto report, i.e. through the application of funds needed to correct the financial imbalance Loconto identified.

The Loconto report recommended the infusion of $12 million into Transit during the future annual period. His recommendation took into account the company's request for $3.5 million through the farebox as a result of the proposed fare, for a total of $8.5 million that he recommended be produced from sources other than the farebox.

We fully agree that debt must be reduced, not increased, and therefore new buses should be purchased for cash. We will require that the company produce $3 million for that purpose. Inasmuch as the company already holds

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$620,000 earmarked for bus purchase, this requirement amounts to a net increase of $2.4 million. In addition to the amount required for bus purchases, we will require $4 million to be applied to the reduction of debt. We are requiring something less than the full amount recommended by Loconto because we are allowing a limited period for the deposit of $2.4 million into escrow for buses and the reduction of debt by $4 million.

The application of the $6.4 million will be a precondition to any increase in the fare. In the past, when we have directed the company to take certain actions, performance has not always been forthcoming. This is most notably true in the bus purchase program. We have no confidence that if we were to require the company to produce new revenue as a concurrent condition with granting a fare increase the new capital would be produced. Transit's attempt to assure us that they are taking some steps to correct the capital and debt situation are not sufficient. We will require assurances in the form of actual performance.

Lest Transit complain that our insistance on the application of the required funds as a precondition to a fare increase is unreasonable, we would remind Transit of our repeated warnings that steps must be taken to improve its financial position. (See for example Order No. 1052, June 1970, p. 15; Order No. 984, October 1969, p. 20.) Mere exhortation has not produced results.

We have before us in this record all the data and material we need to determine whether Transit is entitled to a fare adjustment, and if Transit will comply with the directive of this order within a reasonable time, we believe we can use the existing record, appropriately supplemented, to determine what the fare should be. We will leave the record open in this case for 90 days to allow the company to comply

with the requirements of this order without being required to institute an entirely new case for an increased fare. Beyond the 90-day period, we feel that the record would be too stale to be supplemented adequately, and if the company chooses not to comply during that period, the record will be closed and any increase will have to be based on the presentation of a fresh record.

One word of clarification before we conclude, if it is not already clear, concerning our next probable action with respect to the fares charged by D. C. Transit. We are, at this time, not establishing a new rate for two reasons only. First, we are imposing a precondition, which the company must meet before we will adjust the fare. Second, until a new capital structure and debt structure are established, we cannot determine certain elements in the ratemaking formula, and if those new structures are not established within the next 90 days much of the data before us will not be useful. However, if Transit does comply with the conditions we are establishing in this order, there is then the very strong likelihood that the fare will have to be raised.

We have tried very hard to avoid that result through legislative channels. Three years ago we proposed to the Congress a subsidy for D. C. Transit riders so that the fare could remain at the then-existing level of 30 cents. We even suggested then that the fare should be lowered to 25 cents and kept at that level through public subsidy. Our plea at that time was given little attention. We warned then that the failure to provide a subsidy would inevitably result in higher and higher fares. Again, in this session of the Congress, during the pendency of this very rate case, we appealed to the Congress for a subsidy in order to maintain the bus fare at the 40-cent level. We pointed out the very destructive impact of increasing fares. But the House of Representa-

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tives overwhelmingly rejected the provision of a subsidy. Whatever caused that result, it is a failure of government to respond to the needs of the community. Until that failure is remedied, the spectre of higher bus fares, and their destructive impact, will be with us.

CONCLUSION OF LAW

In consideration of the foregoing we find the fares proposed in Application No. 752 by D. C. Transit System, Inc. to be unjust and unreasonable.

THEREFORE, IT IS ORDERED:

1. That D. C. Transit System, Inc. shall continue to charge the regular route fares presently in effect.

2. That the record in Docket No. 241 remain open for ninety (90) days, until August 17, 1972, for receipt of evidence from D. C. Transit System, Inc. indicating compliance with the financial requirements set forth in this order.

BY DIRECTION OF THE COMMISSION

JEREMIAH C. WATERMAN
Chairman

SULLIVAN, Vice Chairman, dissents from the views of the majority for reasons to be hereafter filed.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1216-A

IN THE MATTER OF:

Application of D. C. Transit System, Inc., for Authority to Increase Fares.

Served May 25, 1972

Application No. 752

Docket No. 241

Following is the opinion of Vice Chairman Sullivan, dissenting from the majority views expressed in Order No. 1216.

My colleagues, in their majority Opinion, have decided to forego for a period of 90 days, and perhaps permanently on the record in this proceeding, a determination of the need for a fare increase for D. C. Transit System, Inc. (Transit). The basis for this action is their expressed concern of Transit's financial condition which has resulted in their directing that certain corporate financial steps be taken as a prerequisite to a consideration of the need for a fare increase.

In only one instance in their Opinion do the majority mention that present expenses exceed revenues, a condition which requires corrective action by the Commission.

Both the Compact and the body of case law dealing with regulation of Transit make it abundantly clear that it is mandatory for our Commission to permit Transit the opportunity to earn a *reasonable* profit on is operations.

My colleagues have appropriately enough, quoted for inclusion in the majority Opinion, the applicable section of the Compact which relates to the stautory law and then have chosen to ignore the evidence adduced in these hearings that Transit is, in fact, in a serious financial crisis, due to lack

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of proper revenues. Transit has proven beyond any doubt, in this proceeding at least, that its *expenses exceed revenues.* In my view, the action of the majority to delay or reject consideration of the need for a fare increase in order to effect changes in capital structure and financing amounts to nothing more than an attempt to "blackjack" Transit, by subjecting a portion of the property of the Company to "confiscation," which in itself is violative of the Constitution.

As a reasonable alternative, the Commission can assume, for rate-making purposes, what it deems to be an appropriate equity-debt ratio and project revenue requirements on this assumed capital structure and set rates accordingly. The approach taken by the majority has left Transit literally "dangling," by simply stating "Put in more capital —irrespective of its source and moreover, irrespective of the very probable lack of potentiality of any such source."

This attitude, in my judgment, amounts to an encrouchment on the prerogative of Management and thereby preempts the inviolate right of the Company to manage its own affairs.

Great weight has been placed upon the "findings and recommendations" of Mr. Loconto, the "financial expert" engaged by the Staff to analyze the structure of the Company, so much so, that one might very well conclude that the decision of the majority, as expressed, considered only his "evidence", in arriving at their decision.

Overlooked, however, is the fact, developed, on cross-examination, that Mr. Loconto is not an expert of sufficient stature in the realm of transit finance to justify the majority relying almost exclusively on his recommendations to arrive at their decision. Assuming, arguendo, his testimony, has probative value, the majority, nevertheless, incredibly ig-

nores the most fundamental premise of his conclusion, ergo; "*The selection* of sufficient actual sources from among the potential sources presented is left with *management* and the *Commission.*" (Transcript P. 1967)

The short answer to the testimony of this "prime" witness for the Staff is simply that he articulates, throughout his entire testimony, the financial plight of the Company, which situation has already been recognized by this Commission on a number of occasions in both decisions and many public utterances. Here, of course, I refer to the pleas expressed to governmental bodies for "subsidy" assistance to "forestall a fare increase."

The "rationale" of the majority, as a justification for refusing any increase . . . at this time, is, of course, the Commission's determination to force the Company to "inject" more equity into its capital structure. However, we have provided no guidelines nor have we determined what the debt-equity ratio is that the majority seeks to impose. If the Company cannot look to this Commission for underlying guidelines to achieve the financial stability desired by the Commission, then to whom must it turn?

As I analyze the decision of the majority, I must conclude that I am constrained to believe that the same was determined, inter alia, that we, in the past, have proven to be "impotent in implementing *and* enforcing our Orders. While this may or may not be the case, if, in fact, then this Commission, and its Staff, have been negligent in the performance of its duties and responsibilities, and perhaps, as has been suggested by some of the intervenors in the instant case, "responsible" (at least in part) for the present financial plight of the Company.

Though this may be true, no Applicant for justifiable relief should ever be penalized for the past failures of this

Commission to act affirmatively upon a showing of non-compliance of its Orders. Here too, appears to be another "reason" for "keeping the record open for ninety days."

The remedy of any Administrative and/or quasi-judicial body—including this Commission—is to avail itself of the Court in the enforcement of its Orders.

In the field of regulation of public utilities, the law is abundantly clear. We need look only to the holding of the United States Supreme Court in the "Bluefield" case,[1] and I quote:

> "Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary."

In the instant case, I fear that we have departed from the principles of public utility regulation as set forth above and have, in fact, embarked upon a course of public utility regulation, by "plebiscite". Such a course can only lead to chaos, and a complete breakdown of our duly constituted regulatory agencies.

Finally, I turn to that part of the majority decision wherein the "record . . . remain open for ninety (90) days . . . for evidence . . .", indicating compliance with financial requirements of this Order. (the pre-condition) I interpret the provisions of Sec. 6(a)(2) of Article XII of the Compact to make it mandatory upon this Commission to make

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[1]Bluefield Water Works and Improvement Co. vs. West Va. P. S. C. 262 U. S. 679, 690, (1923).

a final adjudication of the issues involved on the basis of the present record and to do so within a period of "no later than one hundred and twenty (120) days." The attempted extension for an additional ninety (90) days, as provided in the Order is, in my judgment, a usurpation of legislative prerogative by the Staff and Commission.

The Commission needs no additional evidence of the financial condition of the Company. As stated in the decision of the majority, there is "the very strong likelihood that the fare will have to be raised." I assume this is based upon the evidence already in.

For the foregoing reasons, I dissent.

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WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1216-B

IN THE MATTER OF:	Served May 25, 1972
Application of D. C. Transit System, Inc., for Authority to Increase Fares.	Application No. 752 Docket No. 241

Following is the Supplemental Opinion of Chairman Waterman and Commissioner Shannon in response to the dissenting opinion of Vice Chairman Sullivan.

Vice Chairman Sullivan, in his dissenting opinion received by us today and published as Order No. 1216-A, construes our action in Order No. 1216, issued May 19, 1972, as an attempt to extend the suspension period of Article XII, Section 6(a)(2) of the Compact beyond one hundred twenty (120) days.

We, of course, are aware that Section 6(a)(2) provides that the suspension period terminates no later than one hundred twenty (120) days after the date "the fare, regulations or practices involved was suspended."

When we issued our opinion in Order No. 1216 and ordered that the record in Docket No. 241 remain open for ninety (90) days for receipt of evidence from D. C. Transit System, Inc. (Transit) indicating compliance with the financial requirements set forth in that order, we were in no way extending the time within which we were require to act under the Compact. In Order No. 1216, we found the fares proposed in Application No. 752 by Transit to be unjust and unreasonable and issued an order prescribing the lawful fare to be in effect. These actions met all the

requirements of Section 6(a)(2) and were all taken before the expiration of the one hundred twenty (120) day period.

The sole purpose of leaving the record open as provided in Order No. 1216 was to advise Transit that, if the financial requirements of that order were satisfied within ninety (90) days, the Commission would institute a proceeding under Section 6(b) of the Compact and utilize in that proceeding, to the extent feasible, the record established in Docket No. 241.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1219

IN THE MATTER OF:

Application of D. C. Transit System, Inc., for Authority to Increase Fares.

Served June 16, 1972
Application No. 752
Docket No. 241

On May 19, 1972, we issued our Order No. 1216 which rejected as unjust and unreasonable certain proposed fare increases reflected in tariffs filed by D. C. Transit System, Inc. (Transit); directed Transit to continue to charge the fares currently in effect; and established as a precondition to any future fare adjustment the infusion of $6.4 million into the capital structure of the company. We entered this order on the basis of our finding that Transit's unstable financial structure has resulted in a transit operation which is neither economical nor efficient as required by Section 6 of the Compact, and that this uneconomical and inefficient method of operation, and the resulting deterioration in service, could not be remedied merely with a fare increase.

While we observed that the company's expenses appear to exceed its gross operating revenues, we concluded that the Compact and the Constitution did not require us, as a matter of law, to adjust fares solely on such a showing without regard to the economy and efficiency of the operator's business, its financial instability, and the resulting present and future deterioration in its service to the bus-riding public. Instead, we construed the Compact to provide what we termed a "reciprocal obligation." For the bus rider, this obligation, we held, entailed the payment of a

fare sufficient to enable an efficiently and economically operated transit company to provide adequate transportation services and realize a reasonable return on its investment. For the company, this obligation entails the furnishing of adequate transportation services by an efficiently and economically operated organization to the end that the passenger need pay no more than the lowest fare consistent with a reasonable return.

Having found that Transit had breached its obligation to the bus-riding public, we turned to the appropriate remedy. On the basis of the record before us, we endeavored to look into the future and determine whether, if rates were adjusted, the public could be reasonably assured that the company would correct the inefficient and uneconomic method of operation which we had identified and provide the adequate service which is the riders' due. The record clearly showed that a fare adjustment alone would not remedy the situation and that if our only order was an adjustment in fares, the result would be continued financial instability and a deterioration in the level and quality of transportation service afforded the public. Accordingly, we concluded that drastic remedial action was required to bring the company's capital structure into balance to provide the stability necessary to achieve an efficient and economical transit operation. Thus it was that we required the company to produce $6.4 million in funds from sources other than the farebox and to allocate those funds, in specified amounts, to equipment acquisition and debt retirement as a precondition to a fare increase.

Finally, we were faced with the problem of whether the funding requirement which we established should be a concurrent condition to a fare adjustment, or whether it should be a condition precedent. We were forced to con-

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clude that if fares were adjusted *before* the company produced the required funds, we would have no basis for insuring that they, in fact, would be forthcoming. This, we held, would be calling upon the bus rider to pay a fare to an inefficiently and uneconomically operated transit company without any assurance that the company would remedy those defects and fulfill its obligations to the rider by providing, in the future, efficient, economical, and adequate transportation. We declined to impose such a one-sided and unjust burden on the bus-riding public.

In accordance with these findings and conclusions, we held that Transit had not demonstrated that its proposed fares were just and reasonable, and we directed the company to continue charging the existing rates. To avoid any misplaced reliance on the part of the intervenors or the public, however, we cautioned that once the company had complied with our pre-condition and thereby demonstrated its willingness to provide efficient, economical and adequate transportation services, a fare increase would likely be required. And, to minimize any hardship on Transit while it was complying with our precondition, we stated our determination that the record compiled in this proceeding, once supplemented by the production and allocation of the funds called for by our precondition, would be sufficiently fresh during the 90 days following entry of our order to permit us promptly and expeditiously to adjust the fares. We had in mind proceeding expeditiously, once the company has demonstrated compliance with our precondition, on the basis of the present record, supplemented as need be, to determine the lawful fare to be charged by Transit under the altered circumstances.

Following entry of our order, Transit advised us by hand-delivered letter that it had unilaterally determined our action to be "illegal and invalid" and that it intended to

place into effect in 32 hours the very fares which we had held to be unjust and unreasonable. Faced with this blatant refusal to abide by our order, at least pending an application for reconsideration and, if necessary, judicial review in accordance with the procedures established by Section 17(a) of the Compact, we directed our staff to institute an injunction proceeding in the United States District Court for the District of Columbia pursuant to Section 18(a) of the Compact. After a full hearing, the District Court entered an injunction forbidding Transit from charging fares other than those established in our order. *Washington Metropolitan Area Transit Commission* v. *D. C. Transit Systems, Inc.*, Civil Action No. 1061-72 (D.D.C.).[1]

The District Court entered its injunction at 4:00 p.m. on June 1, 1972. At 4:35 p.m. the same day, Transit filed with us a 24-page document entitled "Notice of Invalidity of Order No. 1216 And, In the Alternative, Application for Reconsideration of Order No. 1216." On June 6, 1972, Transit supplemented its application. Replies were filed by two of the parties. For reasons which follow, we have concluded that Transit's application must be denied.

Although its reconsideration application, as supplemented, presses some 56 alleged errors, we understand Transit's principal argument to be that we were without authority to enter Order No. 1216. Transit, in essence, contends that: (1) we must authorize fares sufficient to enable it to cover its operating expenses and interest requirements and (2) we lack power to precondition any

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[1]In its opinion, the District Court stated: "For an allegedly aggrieved utility with all the advantages of a monopoly and a special Act of Congress to flout the law and established procedures in the manner here described is to say little of its officers and management." It is precisely this kind of conduct which led us to conclude that we could not expect compliance from Transit if we established our funding requirement as a concurrent condition.

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fare increase upon the completion of the corrective measures which we found necessary and appropriate in this case to insure that Transit provides efficient, economical and adequate transportation services. Closely related to these arguments, which are pressed upon us in both statutory and constitutional terms, is Transit's procedural argument which rests on the premise that the Compact requires us to either permit its proposed fares to take effect or to establish a "lawful fare," which Transit contends must at least be a break-even fare, within 120 days from the date a suspension order is entered. We agree that these are the central issues presented in this proceeding, and we have accordingly considered Transit's arguments with commensurate care. We have concluded that our action in this case is fully in accord with statutory and constitutional requirements governing public utility ratemaking.

We start from the premise, not seriously challenged by Transit, that Sections 6(a)(3) and 6(a)(4) of the Compact are to be read together,[2] and that we are required, in passing upon a rate application, to consider and weigh not only the interests of the company, including its right to a reasonable return on its investment, but also the interests of the public, including the public's right to economical, efficient and adequate transportation services. *D. C. Transit*

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[2]In our Order 1057, issued July 1, 1970, we examined at some length the relationship of Sections 6(a)(3) and 6(a)(4) of the Compact. We stated that these sections "must be read [together] to form a harmonious whole," and, while we found that the record then before us did not warrant withholding of a fare increase otherwise compelled by the facts and circumstances in that case, we were quite careful to limit our discussion to the record then before us. See Order 1057, pp. 2-6. Our opinion which accompanies Order 984, issued on October 24, 1969, reflects the same construction of the statute, and the same conclusion that the facts of record in that case did not warrant the action which we have been compelled to take in this proceeding. See Order 984, pp. 25-28.

Systems, Inc. v. *Washington Metropolitan Area Transit Commission*, 121 U. S. App. D. C. 375, 388, 350 F. 2d 753, 766 (1965); cf. *Moss* v. *Civil Aeronautics Board*, 139 U. S. App. D. C. 150, 430 F. 2d 891 (1971). These interests, as we pointed out in Order 1216, impose what we termed "reciprocal obligations" on the part of the carrier and its passengers. Upon a showing that it is now providing, and may in the future reasonably be expected to continue to provide, the economical, efficient and adequate transportation service to which the public is entitled, the carrier, in turn, is normally entitled to a fare which will produce a reasonable return. But where, as in this case, the record demonstrates that the carrier is in default with respect to its obligations under Section 6(a)(3) of the Compact, it is not entitled to fare increase as a matter of law.

Transit's contrary argument overlooks the weight of authority from regulatory agencies operating under statutes similar to ours[3]. Judicial decisions from other jurisdictions are in accord[4]. Indeed, reported decisions reflecting the

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[3]*E.g.*, *Rockville Water and Acqueduct Co.*, 78 P. U. R. 3d 45 (Conn. 1968); reh. den., 78 P. U. R. 3d 53 (Conn. 1969); *North Missouri Telephone Co.*, 49 P. U. R. 3d 313, 317-319 (Mo. 1964); *Blair Telephone Co.*, 51 P. U. R. 3d 262, 264 (Neb. 1963); *Southern Bell Telephone and Telegraph Co.*, 26 P. U. R. 3d 55 (La. 1958); *Long Beach Motor Bus Co.*, 12 P. U. R. 3d 198 (Cal. 1955); *Salt Lake City Lines*, 4 P. U. R. 3d 144 (Utah 1954); *Indiana Associated Telegraph Co.*, 88 P. U. R. (NS) 196, 201 (Ind. 1950); *Commonwealth Telephone Co.*, 19 P. U. R. (NS) 331 (Wisc. 1937); *United Corp.* 1931B P. U. R. 497, 502-504 (Ind.); *Ocean County Gas Co.*, 1919B P. U. R. 874, 880-881 (N. J.).

[4]*E.g.*, *North Carolina* v. *Morgan*, 277 N. C. 255, 177 S. E. 2d 405 (1970); *United Telephone Co.* v. *Florida*, 215 So. 2d 609 (Fla. 1968), appeal dismissed, 394 U. S. 995 (1969); *Lakewood* v. *Lakewood Water Co.*, 54 N. J. Super. 371, 148 A. 2d 885 (1959). Accord: *Apple River* v. *Illinois Commerce Comm.*, 18 Ill. 2d 506, 165 N. E. 2d 329 (1960).

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law in each of the three jurisdictions governed by the Compact demonstrate that our order is not without precedent. As early as 1915, the Public Utilities Commission of the District of Columbia exercised its discretion and refused to grant a fare increase, otherwise justified, when the record showed the transit operator to be rendering inadequate service notwithstanding that the operator was losing money, and would continue to lose money, without the requested increase. *In re Metropolitan Coach Co.*, 1915D P. U. R. 740. The next year, the West Virginia Commission entered a similar order with respect to a water company. *Thorn* v. *Montgomery Light & Water Improvement Co.*, 1916C P. U. R. 406, 408 (W. Va.). See also, *United R. & E. Co.*, 1919C P. U. R. 74, 98-100 (Md.).

Of course, each case must turn on its particular facts, and there are obviously instances in which a fare increase would be justified notwithstanding a finding that a company was not providing economical, efficient and adequate transportation service. In this regard, we agree with the New Jersey court:

> "[T]he board has a large measure of legislative discretion in the exercise of its rate-making power, controlled by the statutory standard. It is free to make 'pragmatic adjustments which may be called for by particular circumstances.' Thus, it may under the facts adduced before it in a particular rate case conclude that the issue of adequacy of service is collateral and would so complicate the rate case that it should be taken care of upon complaint in a separate proceeding. On the other hand, the board would be privileged, in a case where the utility had failed over a long period to provide safe, proper,

and adequate service and had flagrantly disregarded orders of the board to improve that service, to refuse any rate increase as the most practical method of getting the utility to remedy that deficiency. Again, the board might conclude that the inadequate service rendered was due to the company's need for additional revenues for capital expenditures, and determine that the withholding of rate relief might cause further deterioration in service.

In yet another case of demonstrated inadequate service, where the utility promised to make necessary improvements, the board might deny the application, granting leave to renew it after it had had an opportunity to see if the improvements were carried out and the service made adequate and proper, or, where the utility admitted that the service could be improved but claimed financial inability to do so, the board might allow only such rates as would represent the present value of the service, until such time as the service was made reasonably adequate. Finally, it might grant emergency rate increases on the condition that if the utility failed to render reasonable service the rates would be cancelled." *Lakewood* v. *Lakewood Water Co., supra* n. 5, 54 N. J. Super at 381, 382, 148 A. 2d at 890-891. (citations omitted).

We construe the Compact as vesting us with the necessary tools to enable us to discharge our responsibility to the public and insure that it obtains from carriers subject to our jurisdiction economic, efficient and adequate service. Surely, Congress and the Compact signatories did not impose upon us a duty to consider and protect the public interest, on the one hand, and then fetter us with a statutory scheme

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so rigid and unyielding as to make impossible the responsible discharge of that duty, on the other hand. Cf. *Payne* v. *Washington Metropolitan Area Transit Commission*, 134 U. S. App. D. C. 321, 326-327, 415 F. 2d 901, 906-907 (1968); *Moss* v. *Civil Aeronautics Board*, 139 U. S. App. D. C. 150, 160-161, 430 F. 2d 891, 901-902 (1970).[5] Mindful of the fact that our responsibility to protect the public interest is at least equal to our obligation to consider Transit's interests,[6] we hold that while we may grant a fare increase, and condition that increase on a carrier's satisfaction of the steps we have found necessary to insure future performance of its statutory obligation to provide economical, efficient and adequate transportation,[7] we are not compelled to do so if we conclude, as we have in this case, that such an order will not provide sufficient assurance that the public will be protected.[8] We thus reject

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[5]Article XI, Section 2 of the Compact directs us to liberally construe the act "to eliminate the evils described therein and to effectuate the purposes thereof" and Article XII, Section 15 authorizes us to enter such orders as we may "find necessary or appropriate to carry out the provisions of this Act." See cases cited at nn. 6-8, *infra*.

[6]*Moss* v. *Civil Aeronautics Board*, *supra*, 139 U. S. App. D. C. at 161, 430 F. 2d at 902.

[7]We have entered such orders before. See e.g., Order No. 1127, p. 23 (March 24, 1971); Order No. 1101, pp. 24-25 (November 13, 1970), Order No. 1052, pp. 31-33 (June 26, 1970); Order No. 1037, p. 21 (April 23, 1970). Other agencies have likewise found concurrent condition orders effective in certain cases to harmonize the rights of the carrier and the public. *E.g.*, *In re Long Beach Motor Bus Co.*, 12 P. U. R. 3d 198 (Cal. 1955); *Salt Lake City Lines*, 4 P. U. R. 3d 144 (Utah 1954); *Poughkeepsie & W. Falls R. Co.*, 1920C P. U. R. 995 (N. Y.); *Ocean County Gas Co.*, 1919B P. U. R. 874 (N. J.).

[8]Although we have not been forced to enter such an order before, we have already noted that the Public Utilities Commission has. *Metropolitan Coach Co.*, 1915D P. U. R. 740 (D. C.). Other agencies, in rate proceedings such as this, have resorted to a variety of orders to insure that a regulated utility fulfills its obligations to the public. Some agencies proceed to fix new rates, and to suspend the effectiveness of those rates pending proof of satisfactory compliance

Transit's contention that the Compact precludes the entry of an order such as we have entered in this case.

Transit also contends, however, that we have abused our discretion in failing to order it to perform the corrective measures which we have found to be necessary concurrently with the enjoyment of a fair increase. Before we entered our order, we carefully considered whether a fare order with concurrent conditions to protect the public interest would provide us with sufficient assurance that Transit would, in the future, fulfill its obligations to provide efficient, economical and adequate transportation. Several factors persuaded us that it would not.

First, we have found that Transit's financial instability is due largely to management decisions which are the critical factors in creating the present unsatisfactory financial structure. The Loconto report and testimony identified corporate decisions, not inadequate fare revenues, as the major factor in Transit's present financial instability. We concluded that additional funds, not increased fares alone, were required to remedy this situation. Here again, the expert testimony showed that the company's major need was additional funding from sources other than the farebox, and, as we made clear in Order 1216, we agree.

Second, we considered the fact that Transit has shown no willingness to correct its financial structure despite our

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by the utility that the defects have been remedies. *E.g., Blair Telephone Co.*, 51 P. U. R. 262, 264 (Neb. 1963); *Indiana Associated Telegraph Co.*, 88 P. U. R. (NS) 196, 201 (Ind. 1950); *Commonwealth Telephone Co.*, 19 P. U. R. (NS) 331, 335-336 (Wisc. 1937). Other agencies follow the course which we have adopted here and refuse to pass upon the utility's rate request until the deficiencies have been remedied. *Rockville Water and Aqueduct Co.*, 78 P. U. R. 3d 45 (Conn. 1968), reh. denied, 78 P. U. R. 3d 53 (Conn. 1969); *North Missouri Telephone Co.*, 49 P. U. R. 3d 313, 317-319 (Mo. 1964); *United Corp.*, 1931B P. U. R. 497, 502-504 (Ind.).

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exhortations over the years.[9] The continued deterioration of the company's cash position has already caused a substantial deterioration in the service which it offers the public,[10] and we concluded, on the basis of the record and our expertise in transit operations, that unless this situation was remedied, service would continue to deteriortate to *unacceptable* levels. This history forced us to conclude that Transit cannot be relied upon voluntarily to remedy its own financial ills.

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[9]In the first case which this Commission processed with regard to Transit's fares, we noted our concern "about the need for [Transit] to increase its equity in the business in order to insure the financial stability" of the carrier. Order 245, p. 43 (April 12, 1963). In 1966, we reiterated this concern and again called upon Transit's management to remedy the situation. Order 563, p. 11 (January 26, 1966); Order 564, pp. 31-33 (January 26, 1966). At that time, however, we were able to conclude from the record then before us that Transit's financial structure had not interfered with its responsibilities "for rendering good service to the public." Order 564, *supra*, at 31. Even with that finding, however, we stated that "Transit's debt-equity ratio should not be allowed to deteriorate further." *Id.*, at 33. Two years later, we had occasion to disapprove of two management decisions which resulted in a siphoning of cash into two subsidiary corporations, and we noted that "in the management of its cash working capital, the company's guiding principle must be the maximum protection of its ability to meet its obligations under its franchise, the Compact, and Commission orders." Order 773, p. 29 (January 26, 1968). In that same order, we concluded that management's decisions had not seriously affected the adequacy of the company's service, and we found reason to believe that the company had recognized its obligations to the public and would take action to meet those responsibilities in the future. Order 773, *supra*, at 29. Even so, we urged Transit "to raise the cash needed for transit operations through their non-operating properties, if no other sources are available." *Ibid.* The next year, a similar exhortation was contained in our Order 984, at p. 20 (October 24, 1969). Transit has thus been on notice of our concern for more than nine years during which, instead of taking steps to remedy the situation, it has deliberately allowed it to deteriorate.

[10]We found, *inter alia*, that the company's financial instability has resulted in too few drivers, mechanics and bus cleaners, and a

Third, Transit's failures to comply with our prior orders, including importantly Order 1052 requiring bus-purchases, was another factor that persuaded us not to impose concurrent corrective conditions. We thus found no basis to believe that Transit would comply with concurrent conditions. As its failure to comply with our outstanding bus-purchase order has directly affected the adequacy of the company's service,[11] we determined that our precondition order was the only method by which we could insure the public that

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consequent inadequacy of its service. Reports which Transit has filed with us, and which we officially note, show a marked deterioration in the company's service. During May 1971, the company's driver force was only 16.8 below quota on a weekly average, and during the same time, the company had a weekly average of 6.2 drivers-in-training. During May of this year, by contrast, the company was 42.7 drivers under quota on a weekly average, and had only a weekly average of 2.5 drivers-in-training. That this has impacted seriously on the adequacy of the company's service is clearly shown by the number of trip-blocks not operated:

1971		1972	
Week Of	*Trip Blocks Not Operated*	*Week Of*	*Trip Blocks Not Operated*
May 2	57	May 7	106
May 9	27	May 14	73
May 16	28	May 21	132
May 23	45	May 28	191
May 30	54		

A "trip block" represents the trips scheduled to be operated by a single bus on a single day.

[11]The average age of a Transit bus has risen from 6.96 years as of December 31, 1966 to 9.79 years as of September 30, 1971. We know that older buses are less comfortable for the passenger. More importantly, old buses have a higher incidence of mechanical and equipment failure than newer equipment, thereby providing the public with a less reliable, and consequently less adequate, transportation service. Coupled with the company's failure to employ sufficient drivers, mechanics and cleaners, and the marked increase in trips not operated, this is another factor which directly and materially impacts upon the adequacy of its service. See *supra*, n. 10.

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the company would deliver its part of the reciprocal obligations imposed upon it by the Compact.

Finally, the fact that we lack power to insure compliance with a concurrent condition order by requiring Transit to post a sufficient bond to indemnify the public in the event the company fails to comply with our order, or to order the company to make reparations in the event of non-compliance,[13] is another factor which we take into account.

For these reasons, and for the reasons set forth in our principal order, we reject Transit's contention that we lack power under the Compact to enter the order under consideration or that we abused our discretion in providing that Transit's compliance with the corrective measures which we directed shall be a precondition to any fare increase. Transit, however, has another string to its bow, for it argues that even if the Compact authorizes us to enter the challenged order, the Constitution forbids it. We thus turn to Transit's constitutional contention.

Citing *Bluefield Water Works and Improvements Co.* v. *West Virginia Public Service Commission*, 262 U. S. 679 (1923), Transit argues that the effect of our order is the confiscation of its property in violation of the Fifth and Fourteenth Amendments to the Constitution.[14] Our prior orders have shown a sensitive awareness of this principle,[15]

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[13]That we lack such power is clear from *Williams* v. *Washington Metropolitan Area Transit Commission*, 134 U. S. App. D. C. 342, 361 n. 94, 415 F. 2d 922, 941 n. 94 (1968).

[14]Since the confiscation standards are the same whether tested by the Fifth or the Fourteenth Amendment, we have assumed that both amendments are applicable to this Commission established by two states, subject to the Fourteenth Amendment, and the District of Columbia, subject to the Fifth Amendment.

[15]*E.g.*, Order 1052, pp. 2-6 (June 26, 1970); Order 984, pp. 25-28 (October 24, 1969).

and we quite agree that, as a general proposition, an order which requires a public utility to furnish service at a loss constitutes constitutionally prohibited confiscation of its property. But just as performance of its obligation to furnish an economic, efficient and adequate transportation service is a condition to Transit's statutory right to a reasonable rate of return, so too is performance of that obligation a condition precedent to constitutional protection against confiscation. As Professor Barnes has put it:

> "The Supreme Court in its *Bluefield* 'rule' made 'efficient and economical managment' a prerequisite to the utility's claim to either a nonconfiscatory or a reasonable rate of return.
>
> * * *
>
> The utility is normally entitled to revenues adequate to cover its operating expenses, including taxes and depreciation, plus a reasonable return on the investment with which it serves the public. But this right of the utility is dependent upon the full discharge of its obligations to the consuming public, among which is the fundamental duty to observe due diligence in management, to maintain a high standard of efficiency, and to conduct its affairs with maximum economy." Barnes, *The Economics of Public Utility Regulation* 532, 601 (1942).

A principle similar to that which obligates us to disallow unreasonable expenditures which are found to be inconsistent with economic and efficient management, also requires us to insure that before the company insists that the public perform its obligation of paying fares sufficient to provide a reasonable return, the company demonstrate its willingness to provide the public with the economic, efficient and ade-

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quate transportation which the Compact requires. Although infrequently framed in confiscation terms, all of the authorities which we have cited in support of our construction of the Compact, *supra* pp. 4-8, would be subject to constitutional attack if Transit is correct. We decline to assume that regulatory agencies, both in this jurisdiction and elsewhere, have engaged in unconstitutional proceedings for over a half century. We are fortified in this conclusion by those decisions which have squarely rejected confiscation claims when presented.[15]

If, indeed, the company temporarily sustains a loss while it complies with our precondition order, it will not be because we have ordered it to do so, but because the effects of the company's past decisions have now impacted so seriously upon its statutory obligation to provide the public with efficient, economical and adequate transportation service as to require us to direct remedial measures as a precondition to any fare adjustment. The Constitution does not guarantee a public utility immunity from loss occasioned by uneconomic and inefficient management decisions, and we do not believe that it bars a regulatory agency on a record such as this from taking adequate steps to protect the public interest even if the short term effect of such an order is a temporary loss to the company. We made clear in our main order, and we take this occasion to reiterate, that as soon as Transit indicates its willingness to fulfill its statutory obligations to the public, we stand ready to insure that the public fulfills its reciprocal obligations to Transit.[16]

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[15]*E.g., United Telephone Co.* v. *Florida*, 215 So. 2d 609 (Fla. 1968), appeal dismissed, 394 U. S. 995 (1969); *Rockville Water and Acqueduct Co.*, 78 P. U. R. 3d 45 (Conn. 1968), reh. denied, 78 P. U. R. 3d 53 (Conn. 1969)

[16]Transit has mistakenly asserted that we directed compliance with our precondition within 90 days without any evidence establish-

Finally, we briefly turn to Transit's precedural argument which necessarily assumes authority under both the Compact and the Constitution for the order which we entered, but which relies on the time limitations set forth in Section 6(a)(2). From these limitations, Transit argues that its proposed fares became effective as a matter of law since we did not make full findings and establish the "lawful fare" within the period prescribed by Section 6(a)(2). We do not agree. Within the statutory period, we completed full hearings and entered full and complete findings as to why Transit was not providing the efficient, economic and adequate transportation service which it is required to furnish, and we stated our legal conclusion that until Transit remedied this deficiency, it was not entitled to a fare adjustment. We have already set forth in detail the reasons why we believe the Compact compelled this result.[17] We therefore conclude that where, as here, we have found a carrier deficient in its Section 6(a)

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ing that it was possible for the company to comply during that period of time. Wholly aside from the fact that the company has yet to claim inability to comply within a 90-day period, we ordered no such thing. What we did say was that the record compiled in this case would remain sufficiently fresh for 90 days so as to permit us to supplement that record, as necessary, and proceed to prompt disposition of any fare case instituted following Transit's compliance with our preconditions. In the event Transit elects not to comply with our precondition during the 90-day period following issuance of our main order, it is nevertheless free to apply for a rate adjustment whenever it does so comply, and to then ask us to use whatever portion of the present record may remain sufficiently fresh as to permit proper disposition of its application. However, after the expiration of the 90-day period established by our order, Transit will bear the burden of demonstrating that the record in this case remains sufficiently fresh as to warrant its use in any subsequent proceeding.

[17]Of course, as we have already indicated, other cases may call for different dispositions, see *supra*, pp. 617, and we view the Compact as sufficiently flexible to accommodate the need to implement its specific demands with "necessary and appropriate" orders tailored to the facts of a particular proceeding.

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(3) obligations to the public, Section 6(a)(2) requires us to proceed, within the statutory period, to enter an appropriate order. In this case, the appropriate order rejected Transit's proposed fare increases and established the conditions which the carrier must satisfy as a precondition to a rate increase. Until those conditions are satisfied and a further rate order entered, the previously established "lawful fare" continues, as we explicitly held in Order 1216-B, as the "lawful fare" which we are required to establish by Section 6(a)(2).

Transit's remaining arguments do not require extended discussion. It contends that we erred in crediting the testimony of Mr. Loconto. This argument comes too late, for Transit did not object to the competency of the witness at the hearing, nor did it move to strike the testimony. Indeed, Staff Exhibit 17 (the Loconto Report) was received into evidence without objection. Moreover, Transit's reasons in support of its argument are wholly inadequate. We were quite aware of each of the factors which Transit enumerates in its petition for reconsideration, but we concluded that they had little bearing on the evaluation of Mr. Loconto's testimony. The witness testified as an expert in financial analysis, which he uncontestably is, and we considered his testimony highly probative to the issue of economic and efficient management of Transit.

Transit complains, "on information and belief", that the staff improperly participated in our deliberations. The role of our staff is well known to the parties who regularly appear before us, and we note that Transit's counsel has continually appeared on behalf of his client in many proceedings held before us over the years. Like other regulatory agencies,[18] it is the practice of this Commission frequently

[18] *E.g., American Telephone and Telegraph Co.*, 2 F. C. C. 2d 142, 146 (1965).

to consult with its staff, although decision in this proceeding, as in all other proceedings before this Commission, was the result of the determination of the commissioners, based upon their individual evaluation of the record and the arguments of the respective participants in the proceeding. In the past, when our decisions have favored his client, Transit's counsel has not seen fit to object although his present contention, if correct, would vitiate proceedings which terminate favorably to his client as well as those which do not. In these circumstances, we hold that the objection, if it was to be asserted, was required to be made before, not after, the order was entered. By withholding the objection until the petition for reconsideration, it has been waived. *International Paper Co.* v. *Federal Power Commission,* 438 F. 2d 1349, 1357-1358 (2d Cir. 1971).[19]

In the event its application for reconsideration is denied, Transit has asked us to stay our order pending judicial review. In view of our finding that the public is being deprived of efficient, economic and adequate transportation, we could not responsibly stay this order. In any event, we have previously held that we lack power to stay our own orders.[20] Transit's application for a stay will accordingly

We have considered and rejected Transit's other arguments.[21] While we have declined to stay our order pending be dismissed.

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[19]We observe, however, that the practice followed by this, and other regulatory bodies, of consulting with the staff has been sustained in the face of challenges similar to those advanced by Transit. *E.g., American Telephone and Telegraph Co.* v. *Federal Communications Commission,* 449 F. 2d 439, 453-455 (2d Cir. 1971); *Wilson & Co.* v. *United States,* 335 F. 2d 788, 796-797 (7th Cir. 1964), cert. denied, 380 U. S. 951 (1965).

[20]Order 991 (November 17, 1969).

[21]Transit also argues that this Commission has erred in not yet adopting proposed rules for submission to the Price Commission.

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judicial review, we are anxious to discharge our respective responsibilities to the public and to Transit. To this end, we agree that prompt disposition of Transit's contemplated review proceeding is in the public interest, and we will instruct our counsel to cooperate in the establishment of a schedule for expedited briefing and argument of Transit's petition for review to the end that this case may be presented to the Court for disposition at the earliest date consistent with the adequate presentation of briefs and the Court's calendar requirements. In the interim, however, we once again express the hope that Transit will take seriously our precondition requirements and make plans to implement those requirements.

Transit misunderstands the purpose and effect of such rules. The submission to and approval by the Price Commission of such rules merely permits the regulatory agency to assume full and final responsibility for any rate increase it grants without being subject to further review by the Price Commission. In the absence of such rules, this Commission still is required to ascertain the compliance of any rate increase it grants with the guidelines established by the Price Commission. Until we make such a finding, no carrier subject of course, no need for such a finding in this case since we concluded no increase was proper.

THEREFORE, IT IS ORDERED:

1. That the application for reconsideration of Order No. 1216, filed on June 1, 1972, by D. C. Transit System, Inc., as supplemented on June 6, 1972, be, and it is hereby, denied.

2. That the application of D. C. Transit System, Inc., for a stay of Order No. 1216 be, and it is hereby, dismissed.

BY DIRECTION OF THE COMMISSSION

PRESTON C. SHANNON
Preston C. Shannon
Commissioner

SULLIVAN, Vice Chairman, dissents.

No. 72-644

Nov. 22, 1972 - Brief for respondent Black United Front filed. NOT PRINTED.

TABLE OF CONTENTS

	Page
I. ISSUE PRESENTED	1
II. STATUTES INVOLVED	2
III. STATEMENT OF THE CASE	3
IV. REASONS FOR DENYING THE WRIT	11
A. The Issues as Framed by Transit are too Insubstantial for Supreme Court Review	11
B. The Only Issue is Transit's Unmet Responsibility to the Bus Riding Public and Whether the Commission's Response was Lawful	13
C. This Case Will Shortly Become Moot	15
RESPONDENT'S APPENDIX	1a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-644

D. C. TRANSIT SYSTEM, INC.,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,

Respondent,

and

DISTRICT OF COLUMBIA COUNCIL, BLACK UNITED FRONT and DIANA K. POWELL,

Intervenors.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I.

ISSUE PRESENTED

Does a public utility, which has been given substantial exclusive operating privileges in exchange for an assumption of responsibility to provide adequate levels of

service, have the right to exact increased fares for its services in order to avoid losses, even though the utility is managed in such a way as to preclude the rendition of adequate services? Or may a regulatory agency require the utility to correct management deficiencies to assure that the public receives full services in return for increased fares?

II.

STATUTES INVOLVED

Petitioner has not made reference to all of the relevant statutory provisions involved. He failed to cite that section of the Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960), D. C. Code 1 §1410 (1967 ed.) which sets out the criteria for establishment of just and reasonable fares:

Article XII, Section 6(a)(3)

"(3) In the exercise of its power to prescribe just and reasonable fares and regulations and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service."

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III
STATEMENT OF THE CASE

In July 1970, the Washington Metropolitan Area Transit Commission authorized an increase in the basic District of Columbia bus fare for D. C. Transit System, Inc. (Transit) from 32 cents to 40 cents, an increase of 25 percent.[1] Commensurate increases were authorized for Transit's Maryland intrastate and interstate services.

In authorizing a fare increase, the Commission sought to insure that new revenues collected by Transit would be used by Transit's management for operating necessities. Experience had taught the Commission that fare increases were too often justified on the basis of anticipated costs for particular future needs, but after the fare increase became effective, those needs were not met. That had repeatedly been the experience with Transit's program for the purchase of new buses. Although the Transit Commission for a number of years had required that Transit replace a certain portion of its fleet with new vehicles each year, and depreciation allowances for ratemaking purposes had been geared to the assumption that those new buses would in fact be purchased, compliance with the bus purchase requirement had been only sporadic. No new buses had been purchased by Transit since 1968. Thus, in the 1970 rate case, the Commission felt it necessary to take the unusual step of ordering Transit to place $620,000 of its profit in an escrow account to be used for the downpayment on the 85 new buses it was to purchase in the coming year.[2] But

[1] *D. C. Transit System, Inc.* (WMATC Order No. 1052) 85 P.U.R. 3d 1 (1970), *D. C. Transit System, Inc.* (WMATC Order No. 1057) 85 P.U.R. 3d 33 (1970).

[2] *D. C. Transit System, Inc.* (WMATC Order No. 1052) 85 P.U.R. 3d 12-13, 17, 29-30 (1970).

even after that extraordinary requirement had been imposed to insure that money would be available for bus purchases, and actually spent for buses, the buses were never even ordered.

In December 1972, the Commission, having failed to receive a full and satisfactory informal explanation of why the buses had not been purchased, ordered Transit to provide a formal explanation.[3] In its response on December 29, 1971, Transit stated that it had been unable to secure the necessary financing for purchase of new buses even with a high 20-percent downpayment. Concerned "with the implications of this situation wherein the major mass transit operator in the Washington area is unable to continue a program of replenishment of its bus fleet . . . [and] particularly concerned that this should occur in a period following a substantial increase in fares,"[4] the Commission directed its staff to employ the services of a qualified financial analyst to perform a complete analysis of Transit's financial situation to determine exactly what steps Transit needed to take to develop adequate cash flow and financial stability to allow it to continue to provide mass transit service at an adequate level. Touche, Ross & Company, a nationally known and highly reputable accounting firm, was hired to perform the analysis which was done by one of its partners, Pasquale Loconto.

In the meantime, Transit had filed an application for another increase in its basic fare, from 40 cents to 50 cents. When the Loconto analysis was complete and his

[3]WMATC Order No. 1188, issued December 16, 1971, Respondent's Appendix 1a.

[4]WMATC Order No. 1199, issued February 10, 1972, Respondent's Appendix 4a.

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report submitted to the Commission, the staff offered the report as evidence, and Mr. Loconto as a staff witness, as an appropriate matter for Commission consideration in the pending rate matter.

The Loconto report showed in detail that the reason for Transit's inability to secure financing for buses was that Transit's overall financial structure was extremely risky.[5] Loconto employed a number of analytic measures to test the soundness of Transit's financial structure and by each measure serious financial imbalance was confirmed.[6] Loconto concluded that even if Transit were allowed a new fare that would permit it to earn a reasonable return, Transit would not be able to attain any measure of financial stability without also infusing additional funds into the company from sources other than the farebox.

Specifically, using estimates which had been presented in the rate case, Loconto concluded that even if in the first year a 50-cent fare would provide $3.5 million in new revenue, the financial condition of Transit would worsen. If the company were to move toward financial stability, he counselled that in addition to increased farebox revenue the company would need, in the first year, $8.5 million from sources other than the farebox. He noted funds could come from sale of non-operating

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[5]See summary of Loconto's analysis in Order No. 1216, Petitioner's Appendix, A-67-72.

[6]As noted by the Court below, a comparison with other transit companies showed Transit to have the least stable structure by all indices, and to be dependent on increasing, dangerously high levels of short-term debt. *D.C. Transit System, Inc. v. WMATC* (CADC No. 72-1555, decided July 28, 1972) (not yet reported) Petitioner's Appendix, p. A-9 note 35.

properties or calling outstanding interest-free loans to corporate affiliates, as well as increasing equity capital. He recommended further infusion of funds from sources other than the farebox in ensuing years.

At no time did Transit dispute Loconto's analysis, nor in any manner attempt to rebut it. At no time did Transit even assert, much less prove, that the infusion-of-funds remedy was either impossible, or for any other reason, inappropriate.

Thus, the Commission had before it undisputed evidence of a severe imbalance in the financial structure of Transit, which a fare increase alone could not substantially mitigate, and a detailed recommendation for correction which was unchallenged.

The Commission also had before it a record of the results of inadequate financing. All of the major indicators showed deteriorating transit service with greater deterioration to come. Not only had Transit been unable to purchase needed new buses in the past but it offered no hope or assurance that it could do so in the future even with an increased fare. Fewer drivers, fewer bus mechanics, and fewer bus cleaners than were necessary to provide the service Transit was obligated to render were being hired, trained, and retained by the company.[7]

It was on the basis of that record that the Commission was required to determine the just and reasonable fare.

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[7]WMATC Order No. 1216, Petitioner's Appendix A-74; WMATC Order No. 1219, Petitioner's Appendix A-95, 96 note 10.

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In setting fares, the Commission is required by statute[8] to give consideration to a number of factors, including the carrier's need for revenues to enable it to provide efficient transportation services under honest, economical, and efficient management.[9] Further, the Commission is required, under guidelines set out by the United States Court of Appeals for the District of Columbia, to establish fares that will provide not merely the form but the substance of financial stability to the regulated enterprise.[10] On the question of economic and efficient management, the Commission found that management practices had resulted in a financial structuring that precluded the company from buying buses or otherwise providing an adequate level of service, and was clearly inefficient and uneconomical management.[11] It also found that raising the fare would not by itself ensure financial stability.

In those circumstances, the Commission concluded that if it were to raise the fare and nothing more, it would be requiring the bus riding public to make its contribution to the viability of the transit system with no commitment from Transit's management that viability would be restored and adequate service rendered. The Commission asserted that the obligation of the ratepayer to the company is not a unilateral one, but has its

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[8]Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960), D.C. Code 1§ 1410 (1967 Ed) Art. XII Sec. 6(a)(3).

[9]id.

[10]*D. C. Transit System Inc. v. Washington Metropolitan Area Transit Commission*, 35 F.2d 753, 778 (CADC 1965).

[11]WMATC Order No. 1216, Petitioner's Appendix A-74.

reciprocal in the company's obligation to provide service in return for reasonable fares paid.

Thus, the Commission determined that if it were to allow an increase in the fare, it would, as a condition to an increase, require Transit to correct the financial imbalance that Loconto had identified. But the Commission had no confidence that even if the company were ordered to produce the needed new funds, it would do so. The Commission had been over that ground before with this company. Frequently before, in fact in every Transit rate case which had ever been before the Commission, over a period of nine years, the Commission had pointed to the problem of financial imbalance and had warned the company that some corrective measure involving production of funds from a source other than the farebox would be necessary.[12] Those warnings had been totally ignored by Transit. This time, therefore, the Commission determined that the only assurance it would have that the imbalance would be corrected, so that bus purchases and bus services would be restored to an adequate level, would be to require Transit to correct, or at least begin to correct, the imbalance before any new farebox revenues would be available.

The Commission's disposition of the matter, then, was to order Transit to produce $6.4 million, specifically for the purpose of purchasing new buses and decreasing its debt along the lines of the Loconto recommendations, as a pre-condition to any further fare increase.

Transit's application for increased fares and the supporting material had been filed in late December

[12]See WMATC Order No. 1219, footnote 9, Petitioner's appendix A-95, wherein Commission's prior orders are summarized.

1971. In May 1972, when its order disposing of the case and establishing the precondition was issued, the Commission concluded that if the record in the rate case were held open beyond a further 90-day period, some of the data presented would be stale and useless for proper ratemaking determinations. Therefore, the Commission said that it would leave the record in the rate proceeding open for a 90-day period beyond May 19, 1972, and if Transit were to produce the necessary funds in that period, the Commission could proceed then to adjust the fare on the basis of the record it had before it. If Transit took more than that ninety days to produce the necessary funds, then the record in the rate case would be closed and a new record would have to be developed in order to provide a proper basis for any fare adjustment. The Commission did not, as Transit asserts, require Transit to produce $6.4 million in ninety days as a condition to a fare increase. It required that the funds be produced within ninety days as a condition to keeping that particular record open.[13]

Six days after the issuance of the Commission's order denying the fare increase, the company served notice on the Commission that it intended to charge the proposed higher fare in spite of the Commission's order specifically denying the authority to do so.[14] This necessitated a request by the Commission to the United States District

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[13]This is all made perfectly clear in WMATC Order No. 1216-B, issued May 25, 1972. Petitioner's Appendix A-83. See also Judge Robinson's opinion below, Petitioner's Appendix A-42-44.

[14]Letter of S. O. Hatfield, Executive Vice President, D.C. Transit System, Inc. to Washington Metropolitan Area Transit Commission, dated May 25, 1972, Respondent's Appendix 7a.

Court to issue an injunction against the unlawful act of Transit. The injunction was granted.[15] Then, following the prescribed statutory procedures for court review of commission orders, the company petitioned the Commission for reconsideration, which petition was duly denied.[16] The matter was appealed to the United States Court of Appeals for the District of Columbia Circuit which affirmed the Commission's orders on July 28, 1972.

Meanwhile, the 90-day period (to expire on August 17, 1972) during which the Commission would keep the rate case docket open to allow Transit time to produce the additional funds, was running. The expiration date came and went without any further indication from the company as to whether it intended to attempt to produce those funds or not. Transit asserts in its petition to this Court that "subsequent events have shown" that Transit could not have produced the funds required by the Commission order.[17] The record, in fact, shows no such thing. The record shows only that the recommendation for production of new funds was made by Loconto in April, that the Commission adopted his recommendation in May, and that no funds were produced then, or in August, or ever. Whether they were not produced because the company could not produce them, or simply would not, is a matter of conjecture, not a matter of record.

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[15] *Washington Metropolitan Area Transit Commission v. D.C. Transit System, Inc.* (D.D.C. C.A. No. 1061-72, decided June 1, 1972 (not yet reported).

[16] WMATC Order No. 1219, Petitioner's Appendix A-85.

[17] Petitioner's Petition, p. 7, footnote*.

IV

REASONS FOR DENYING THE WRIT

The record in this case is over 4,000 pages long. Essentially, petitioner asks this Court to review again that record and to conclude that not only the Commission, but the Court of Appeals, erred in evaluation of the record. Petitioner asks for this extraordinary review notwithstanding the meticulous attention which the Court of Appeals gave in its fifty-nine page Opinion to each of the contentions which petitioner seeks to assert here. While, as we proceed to show, the Court of Appeals correctly decided this case, certiorari would be inappropriate even if there was an arguable basis of error presented by the petition. This case, which arises under a compact applicable only to mass surface transportation in the District of Columbia area, obviously involves a matter of local concern of the type to which this Court has historically deferred to the local courts in the District of Columbia. For this reason, and because this case will become moot long before it can be briefed and argued, certiorari should be denied.

While we place principal reliance on the careful opinion of the Court of Appeals, we briefly set forth the considerations which warrant denial of the petition.

A. THE ISSUES AS FRAMED BY TRANSIT ARE TOO INSUBSTANTIAL FOR SUPREME COURT REVIEW.

The issues, as presented by Transit, asserting denial of due process and violation of orderly judicial process, when viewed against the background of the solid record of financial instability resulting from management decisions, the history of this company's non-compliance

with Commission orders, and its failure to provide adequate services, do not present any basis for Supreme Court review of this case. Transit's issues are on their face without substance.

For example, the issue of the sufficiency of the evidence of uneconomic and inefficient management, even if that were the kind of issue this Court should spend time on, is no issue at all. There is strong evidence in this case, unrebutted by Transit, that Transit's financing has been inappropriate and totally inadequate for a transit operation in a major city. The record shows the results of that financial inadequacy—failing service and an inadequately maintained, aging bus fleet. The evidence could not be better to show inefficient and uneconomic Transit management.

Transit's argument that the Court of Appeals improperly failed to consider whether the Commission finding of uneconomical and inefficient management was supported by the record,[18] ignores the fact that the Court addressed that specific issue and sustained the Commission finding (Petitioner's Appendix, A-33-36). The Court of Appeals recognized that the Commission's findings of inefficient and uneconomical management "were based principally on analysis presented in the Loconto report" which it had discussed at length earlier in its opinion (Petitioner's Appendix A-6-12). Clearly, the Court was aware of the contents of that report, and just as clearly it deemed the Commission's findings based on the report sufficient to support a further finding of uneconomical and inefficient management.

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[18] Petition, pp. 26-27.

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Transit's attempt to make an issue from its own whole-cloth accusation that the Commission was trying to force Transit into public ownership as the true motive for its action in denying the fare increase, is, at the very best, frivolous.

Finally, with respect to Transit's assertion that the denial of the fare increase constitutes confiscation without due process of law, it is clear that Transit's own policies are the cause of any losses. Deliberate management policies caused the deterioration of the transit system and forced the Commission, in the furtherance of its statutory duty, to deny the imposition of increased fares until the company met its obligations to the public. As the Commission made clear, as soon as the company corrected its deficiencies, the Commission was prepared to adjust fares to an appropriate level.[19]

B. THE ONLY ISSUE IS TRANSIT'S UNMET RESPONSIBILITY TO THE BUS RIDING PUBLIC AND WHETHER THE COMMISSION'S RESPONSE WAS LAWFUL.

The real issue in this case, as the Commission conceives it, as we read the Court of Appeals view of it, is as follows:

> Does a public utility, which has been given substantial exclusive operating privileges in exchange for an assumption of responsibility to provide adequate levels of service, have the right to exact increased fares for its services in order to avoid losses, even though the utility is managed in such a way as to preclude the rendition of adequate

[19] WMATC Order No. 1216, Petitioner's Appendix, A-76; WMATC Order No. 1219, Petitioner's Appendix A-87.

services? Or may a regulatory agency require the utility to correct management deficiencies to assure that the public receives full services in return for increased fares?

If the Commission must require the public to pay increased fares no matter what management deficiencies are found and no matter how those deficiencies affect the level of service to the public, then the Commission did indeed err. But we do not believe that the Compact imposes such a narrow regulatory requirement nor can the Constitution be read to do so. The case law which we treated in detail in Order No. 1219[20] certainly does not support that proposition.

If Transit's view of the law were valid, the Commission could not function in any true regulatory sense. As the Court of Appeals observed:

> "... If Transit is correct, the Commission is powerless to sanction corrective measures by deferring further consideration of a fare increase. If Transit is correct, it may disregard its public responsibilities at will—as the Commission found that it has frequently done [footnote omitted]—and yet insist that the public respond to its demands for higher fares. We cannot accept that position. We do not believe the Constitution left the Commission impotent to deal with the situation confronting it in a sensible manner." [21]

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[20] Petitioner's Appendix, A-85-104.

[21] Petitioner's Appendix, A-52. See *Smyth v. Ames* 169 U.S. 466, 545-47 (1897); *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission* 350 F.2d 753, 766 (CADC 1965).

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C. THIS CASE WILL SHORTLY BECOME MOOT.

Public Law 92-517, effective on October 21, 1972, authorizes the Washington Metropolitan Area Transit Authority to assume control of the four major regular route bus operations in the Washington Metropolitan area, including the largest, D. C. Transit System, Inc. It is the Transit Authority's public position that it intends to assume the operation of this company by January 1, 1973, and it has published the schedule under which it intends to accomplish that takeover. Therefore, by about the first of the year, the services and the fares at issue here will no longer be provided by Transit.

The relief that Transit seeks in this case is a remand to the Court of Appeals.

If that remand were made, and if then the Court of Appeals were to reverse itself and find the Commission erred in not raising Transit's fare, the Court of Appeals could not calculate what that fare should be. Therefore, a further remand to the Commission would be necessary, and further Commission proceedings, before Transit could have any relief. Even then a new rate could be set only prospectively, with no possibility of any retrospective relief. Thus, if Transit were not operating these regular-route services at the time the Commission would complete its work, this Court's ruling would be pointless in terms of relief to Petitioner.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Washington Metropolitan
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1625 I Street, N. W.
Washington, D. C. 20006
(737-6711)

November 24, 1972

APPENDIX

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D.C.

ORDER NO. 1188

IN THE MATTER OF : Served December 16, 1971
D.C. Transit System, Inc.)
Bus Purchase Program.)

In Order No. 1052, issued June 26, 1970, we ordered D. C. Transit System, Inc. to escrow $619,998 in six equal installments beginning September 1970, to provide funds for down payments on the purchase of 85 buses. To date those buses have not been purchased.

According to company officials, commercial financing for the purchase of 85 buses is, and has been since issuance of Order No. 1052, unavailable. Further, it appears that government capital loan financing, which the company had sought through the Washington Metropolitan Area Transit Authority, will not be forthcoming. We are interested in knowing, pursuant to our regulatory responsibilities, the underlying causes of D. C. Transit's inability to secure such financing and to examine the full implications of that situation. Therefore, we will undertake a formal investigation of the failure of the company to purchase buses and the resulting implications.

THEREFORE, IT IS ORDERED that D. C. Transit System, Inc. shall submit, in writing, within fourteen (14) days of the issuance of this order, a full explanation of its failure to purchase buses as required by Order No. 1052, with appropriate documentation in support thereof.

BY DIRECTION OF THE COMMISSION
/s/
JEREMIAH C. WATERMAN
Chairman

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1199

IN THE MATTER OF: Served February 10, 1972
D. C. Transit System,)
Inc., Bus Purchase)
Program.)

In Order No. 1052, issued June 26, 1970, we ordered D. C. Transit System, Inc. (Transit) to escrow funds to provide down payments for the purchase of 85 buses. As of December 16, 1971, those buses had not been ordered, and we issued Order No. 1188 instituting a formal investigation of the company's failure to acquire the buses. As a first step, we ordered Transit to submit, in writing, a full explanation of its failure to purchase buses as required by Order No. 1052 with documentation to support that explanation.

On December 29, 1971, Transit submitted a letter in which it stated that it had been unable to secure bus-purchase financing through the normal commercial channels and had been unable to secure the sponsorship of the Washington Metropolitan Area Transit Authority for a loan for the purchase of the new buses. The reason for its inability to secure commercial financing, Transit asserts, is that actual revenues have fallen short of those anticipated by Order No. 1052.

Transit says that it "has been advised that when and at such time as its cash flow position is such that the financiers can readily determine that the company is in a

position to meet its financial commitments, they would be more than willing to discuss the financing of new equipment."

We are concerned with the implications of this situation wherein the major mass transit operator in the Washington area is unable to continue a program of replenishment of its bus fleet. We are particularly concerned that this should occur in the period immediately following a substantial increase in fares. Therefore, we will direct our staff to secure the services of a qualified financial consultant to advise what financial steps should be taken by the company management to allow this company to develop adequate cash flow and financial stability, which in turn will permit the company to continue to purchase rolling stock and other items essential in the conduct of a mass transit business. The expenses of this investigation will be assessed against the company pursuant to Article XII, Section 19(a) of the Compact.

THEREFORE, IT IS ORDERED:

1. That the staff hire a consultant to perform a financial analysis of D. C. Transit System, Inc. and to make recommendations as to the financing required to give Transit necessary financial stability.

2. That D. C. Transit System, Inc., be, and it is hereby, assessed $12,000 which it is directed to deposit in the name and to the credit of the Washington Metropolitan Area Transit Commission in the American Security and

Trust Company, 1612 K Street, N. W., Washington, D. C., on or before February 24, 1972.

BY DIRECTION OF THE COMMISSION

/s/
JEREMIAH C. WATERMAN
Chairman

SULLIVAN, Commissioner, not participating.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1199A

IN THE MATTER OF: Served February 24, 1972
D. C. Transit System, Inc.)
Bus Purchase Program.)

Order No. 1199, issued February 10, 1972, erroneously noted Sullivan, Commissioner, as not participating. It should have listed him as dissenting.

THEREFORE, IT IS ORDERED that Order No. 1199 be corrected to list Sullivan, Commissioner, as dissenting, rather than as not participating.

FOR THE COMMISSION:

/s/
DOUGLAS N. SCHNEIDER, JR.
Executive Director

D. C. TRANSIT SYSTEM, INC.
2251 26th Street, N. E.
Washington, D. C. 20018

Samuel O. Hatfield
Executive Vice President

May 25, 1972

By Hand
Washington Metropolitan Area
Transit Commission
1625 I Street, N. W.
Suite 316
Washington, D. C. 20006

Re: Application No. 752
Docket No. 241

Dear Sir:

This is to notify you that it is our view that on its face Order No. 1216 is inconsistent with and in violation of the Compact and hence illegal and invalid and that, accordingly, Section 6 of Article XII, Title II of the Compact requires us to put our proposed new fares into effect at the end of the statutory suspension period.

Accordingly, at 12:01 a.m. on Saturday morning, May 27, 1972, it is our present intention to put into effect the fares described in WMATC Tariff No. 41R and in the revised pages of WMATC Tariff No. 45 as attached to our application in the above matter, unless previously enjoined by a court of competent jurisdiction.

Very truly yours,

/s/
S. O. Hatfield
Executive Vice President

Supreme Court of the United States

October Term—1972

No. 72-644

D.C. TRANSIT SYSTEM, INC.,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,

Respondent.

and

DISTRICT OF COLUMBIA CITY COUNCIL,
BLACK UNITED FRONT,

and

DIANA K. POWELL,

Respondents (Intervenors).

DIANA K. POWELL MEMORANDUM IN OPPOSITION TO D.C. TRANSIT PETITION FOR WRIT OF CERTIORARI

Respondent (Intervenor) Diana K. Powell opposes granting of Certiorari in the above-entitled cause on grounds stated below:[1]

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[1] Grounds that no question reviewable by this Court, and specific reply to D.C. Transit's contentions will undoubtedly be presented by Respondent W.M.A.T.C.

Respondent Powell appeared as a formal party in opposition to D.C. Transit's claim for increased fares before the Washington Metropolitan Area Transit Commission, (WMATC), and as an Intervenor in the United States Court of Appeals for the District of Columbia Circuit. She also filed a Petition for Review, *Powell v. W.M.A.T.C.*, U.S. App. D.C. No. 72-1603, decided Aug. 21, 1972, not yet formally reported, informally reported at 100 W.L.R. 1901, which was dismissed on the ground "One is not aggrieved and cannot obtain judicial review from an order granting the relief sought." The Constitutional question raised by Respondent Powell before the Commission, in argument before the Court of Appeals, and in her Petition, is that the "Compact" (Appendix to Petition A-2 *et seq.*)[2] relied on by D.C. Transit, an Act of Congress creating the W.M.A.T.C. and defining regulation of Petitioner, discriminates against the Washington area, in violation of the right to equal protection of the laws under Amendments V and XIV of the Constitution, in that it attempts to suspend application of pertinent provisions of the Interstate Commerce Act and Clayton Antitrust Act (Article VIII) and to allow a different rule of ratemaking (Article XII, Section 6(a)(4)). These provisions of the Compact have allowed D.C. Transit, in addition to substantial growth income, annually to claim dividends equalling the total cash investment, causing gross imbalance and distortions of the debt-equity ratio.

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[2] Washington Metropolitan Area Transit Regulation Compact, Public Law 87-767; 76 Stat. 764, approved Oct. 9, 1962.

Attention of this Court is directed to consent to sale by Transit's management and approval of acquisition by Congress.

Respondent Powell respectfully submits that Petitioner's contentions are moot, and that Petition for Certiorari should be denied.

Respectfully submitted,

DIANA K. POWELL, *pro se,*
1500 Massachusetts Avenue, N.W.
Washington, D.C. 20005 (223-0640)
Respondent (Intervenor)